

12-1-1979

United States Antidumping Procedures Under the Trade Agreements Act of 1979: A Crack in the Dam of Nontariff Barriers

Jeffrey B. Sklaroff

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/iclr>



Part of the [International Trade Law Commons](#)

Recommended Citation

Jeffrey B. Sklaroff, *United States Antidumping Procedures Under the Trade Agreements Act of 1979: A Crack in the Dam of Nontariff Barriers*, 3 B.C. Int'l & Comp. L. Rev. 223 (1979),
<http://lawdigitalcommons.bc.edu/iclr/vol3/iss1/9>

This Recent Developments is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College International and Comparative Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

RECENT DEVELOPMENT

United States Antidumping Procedures Under the Trade Agreements Act of 1979: A Crack in the Dam of Nontariff Barriers

I. INTRODUCTION

In an increasingly determined push toward world-wide free trade, the major trading nations have attempted to eliminate any obstacles which may prevent the achievement of this goal. Initially, tariffs were thought to be the primary obstacle to free trade. The General Agreement on Tariffs and Trade (GATT)¹ was signed in 1947. It was the first multilateral effort aimed at the substantial reduction of general tariff levels throughout the world. Recently, however, it has become clear that while high tariffs may hamper free trade, nontariff barriers prevent it absolutely.² The Tokyo Round of Multilateral Trade Negotiations³ (MTN) was the first comprehensive effort by the major trading nations to remove the obstacles to free trade presented by nontariff barriers. The Tokyo Round has had a profound effect on the foreign trade laws of some of the signatories to the Agreements.

This Recent Development will begin with a general discussion of nontariff barriers: their character, classification and effect on world trade. Particular emphasis will be placed on the practice known as dumping, and antidumping duties. Antidumping duties are the resulting nontariff barrier used to curb the practice of dumping. Second, there will be a brief analysis of the recently concluded Tokyo Round of Multilateral Trade Negotiations followed by an examination of the statute that implements those agreements in United States law: the Trade Agreements Act of 1979.⁴ Finally, the author will provide a guide to the current United States antidumping procedures. This guide will

1. Oct. 30, 1947, 61 Stat. pt. 5, at All, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1950). The GATT is a multilateral agreement governing national action in trade policy matters.

2. See *Carter Sends Trade Pact to Congress for Approval*, N.Y. Times, June 20, 1979, § D, at 1, col. 4.

3. Since GATT was signed in 1947, there have been periodic rounds of MTN. These rounds have attempted to carry out the declared intent of the original agreements. See § III *infra*.

4. Pub. L. 96-39, 93 Stat. 144 (1979) (codified in scattered sections of 19 U.S.C.).

compare the new provisions of the Trade Agreements Act of 1979 with the prior procedures contained in the Antidumping Act, 1921.⁵

II. NONTARIFF BARRIERS TO TRADE

A. *Trade Barriers in General*

The use of the term 'trade barrier' has become so popular⁶ that one might think of it as an easily defined and widely understood term of art. Unfortunately, this is not the case. Trade barriers elude any fixed definition and those definitions that have been devised are not suitable for all applications. One suggested definition of trade barriers encompasses any measure (public or private) that causes internationally traded goods and services, or resources devoted to the production of these goods and services, to be allocated so as to reduce potential world income.⁷ This definition is unrealistic insofar as it describes a theoretically perfect economic definition, leaving extremely indefinite boundaries for pragmatic application. A similarly broad definition might include any measure or attitude which distorts the natural course of world trade by favoring one nation over another.⁸

These broad definitions have been limited and qualified when applied to specific trade barriers with the type of qualification dependent on the particular circumstances involved. For example, the definition has been limited to those government laws, regulations, policies or practices intended to protect domestic producers from foreign competition or artificially stimulate exports of particular domestic products. This definition excludes restrictive private business practices. The critical issue for such a definition is whether there is equal market access for domestic and foreign products. If such market access

5. 19 U.S.C. §§ 160-73 (1976).

6. Efforts to erect and to avoid obstruction to trade have been in existence since ancient times. In 416 B.C., for example, Athens attempted to control all Aegean commerce in flax, pitch, wax, rope and copper and iron in order to prevent this trade from reaching Macedonia. In 407 B.C., Carthage imposed an agreement on the then infant Roman state limiting Rome's trade to the Western Mediterranean, thus keeping the rich Eastern trade for the Carthaginians. The Punic Wars between Rome and Carthage beginning about 250 years later were largely over these trade problems. See generally U.S. TARIFF COMMISSION, TRADE BARRIERS 37 (1974) [hereinafter cited as TRADE BARRIERS].

7. See D. BALDWIN, NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE 43 (1974). Potential world income is that level attainable if resources and output are allocated in an economically efficient manner. Productive resources and goods and services are efficiently allocated if they cannot be redistributed in such a way that some individuals will be better off and none will suffer. *Id.*

8. Surprisingly enough, this definition was suggested by the National Association of Manufacturers, an organization that would seem to be concerned with promoting a specific and practical definition rather than a broad, quasi-philosophical definition. NATIONAL ASSOCIATION OF MANUFACTURERS, THE MANY FACES OF NONTARIFF BARRIERS (1974).

is equally available, then discrimination does not exist and neither does a trade barrier.⁹

The United States Tariff Commission¹⁰ previously concluded that a trade barrier simply consisted of some undesirable or unacceptable constraint upon the international exchange of goods.¹¹ The Commission further concluded that the specific definition of a trade barrier depends largely upon the point of view of the individual involved, as well as the political, economic, and social context in which the problem is being considered.¹² Based on an extensive survey of United States business interests, the Commission later revised its findings and issued an operational definition of trade barriers: virtually any policy, action, or arrangement, whether governmental or nongovernmental and regardless of purpose, that increases the cost of delivering a product in a market, or lowers a competitor's cost, or otherwise in any manner lessens the ability of businesses to sell and compete in foreign markets.¹³

B. Nontariff Barriers

Nontariff Barriers have been defined as "any governmental or private regulation, practice or policy other than an ordinary custom duty, that interferes with a normal conduct of trade and tends to distort the volume, composition, or direction of trade flow."¹⁴ In its broadest use, the term nontariff

9. Thus, an extremely burdensome or punitive tax would not be classified as a trade barrier if it applied indiscriminately to both domestic and imported goods. *TRADE BARRIERS*, *supra* note 6, at 39.

10. The name of this agency was changed to the International Trade Commission by the Trade Act of 1974, 19 U.S.C. § 2231(a) (1976).

11. *TRADE BARRIERS*, *supra* note 6, at 41.

12. *Id.* at 42. A trade official in a centrally-planned socialist economy, for example, would give an entirely different definition of trade barriers than a businessman in the United States. A businessman in Western Europe would find acceptable and "normal" constraints which his counterpart in the United States would not, and vice versa; and the viewpoint of the businessman in Japan would probably differ from both his American and European counterparts. Moreover, the views of all are likely to change over time. For example, U.S. producers today accept almost without question numerous governmental regulations and controls upon the quality, design or content of their products. Only thirty years ago these controls would have been viewed as gross and unnecessary governmental intrusions. Although the American producer accepts these controls, the producer in a foreign country without such regulations will likely regard them as a trade barrier. *Id.*

13. *Id.* at 43.

14. *Id.* ch. 6 (emphasis added). See also R. BALDWIN, *NONTARIFF DISTORTIONS OF INTERNATIONAL TRADE* (1970); K. DAM, *THE GATT: LAW AND INTERNATIONAL ORGANIZATION* (1970); Kelly, *Nontariff Barriers*, in *STUDIES IN TRADE LIBERALIZATION* 265-314 (B. Balassa ed. 1967); Wilson, *Nontariff Barriers to International Trade: A Survey of Current Problems*, 18 J. PUB. L. 403 (1969) [hereinafter cited as Wilson].

In past GATT discussions there has been some confusion regarding the labelling of certain measures that lie between the rate of duty itself and the outermost peripheral administrative requirements related to the collection of duties. European countries generally referred to such practices as para-tariffs. *TRADE BARRIERS*, *supra* note 6, at 38. This distinction was gradually

barrier would include any measure which restricts the free flow of goods in international commerce. However, a more generally accepted definition would include only those measures which are intended to restrict trade.¹⁵ The best example of the latter type of barrier is an import quota which limits imports of an item to a specified quantity. Health and safety legislation exemplifies a broader category, which, although enacted for entirely different motives, has the effect of restricting trade. A third category subsumes laws or practices which are necessary to a system of international trade, but create domestic delays or uncertainties which deter future trading attempts.¹⁶ An example of this type of nontariff barrier is a customs classification system which is too complex to allow an importer to determine the rate of duty for a particular item prior to importation.

A GATT committee has identified 276 nontariff barriers currently in use.¹⁷ These were grouped into five basic categories: government participation in trade; customs and administrative procedure; specific limitation of imports and exports; restraint on imports and exports by price mechanisms; and 'other' restraints.¹⁸

The International Trade Commission (ITC) has developed a list of 47 nontariff barriers which it grouped into 6 basic categories: quantitative restrictions and specific limitation, including quotas, embargos and licensing requirements; nontariff charges on imports, including border taxes and excise taxes; government participation in trade, including subsidies, government monopolies and government procurement standards, including health, safety and industrial standards; customs procedures and administrative practices, including antidumping and countervailing duties; and discriminatory ocean freight rates.¹⁹

The recent increase in public concern over nontariff barriers has led some to believe that the barriers are recent innovations being utilized with increasing regularity by governments around the world. This is not true. Only the term 'nontariff barrier' is relatively new to popular usage.²⁰ Several developments have contributed to this increased public awareness and attention. The most important of these developments has been the progressive reduction of most tariffs in the major trading nations over the past 25 years. This had led to the implementation of other types of limitations or controls upon international

dropped and during the Kennedy Round of negotiations everything other than the actual rate of duty was characterized as nontariff barriers. *Id.*

15. Wilson, *supra* note 14, at 404.

16. *Id.*

17. *Non-tariff Trade Barriers*, 121 EUROPEAN COMM. BULL. 14 (1969).

18. *Id.*

19. TARIFF BARRIERS, *supra* note 6, at 11.

20. The first major antidumping statute was passed by Canada in 1904. See An Act To Amend the Customs Tariff of 1897, 1904, 4 Edw. 7, c. 11 (Can.).

trade. Consequently, these other controls are more useful and appear to be more important than before when high tariffs were the major limitation upon free trade. Other developments leading to the increased awareness of nontariff barriers include the enormous increase in world trade and a concomitant increase in government participation in, and regulation of, such trade.

1. Dumping

Dumping is the practice of selling goods in an export market at prices below those prevailing in the home market. It is sometimes referred to as price discrimination between national markets.²¹ From the turn of the century to the present, the international trading community uniformly has regarded dumping as a distortion of natural trade patterns.²² Accordingly, the nations of the Western trading world and Japan have enacted antidumping laws. The function of these laws is to raise the dumped price to the home market value. The antidumping duty is imposed in addition to any tariff otherwise applicable.²³

Dumping has been traced to 16th century Elizabethan England when foreigners were charged with selling paper at a loss to prevent the rise of the new British paper industry.²⁴ Concern over price discrimination by private firms in foreign markets became a more heated issue after the Industrial Revolution made large scale production of goods possible. Industrialization led to the development of cartels in Europe and trusts in America, which in turn fostered greater trade protectionism. Between 1890-1914, it was a common practice for German cartels, protected at home by high tariffs, to charge lower prices for exported goods than for goods domestically consumed.²⁵ During this same period the United States began to dump steel products and heavy machinery in Europe, Canada and the British colonies.²⁶

The international trading community initially sought to control dumping through international agreements condemning the practice. These agreements placed the duty of prevention on the exporter's home government.²⁷ In 1904, Canada became the first country to assess a special duty against dumped im-

21. J. VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* 3 (1923) [hereinafter cited as VINER].

22. *TRADE BARRIERS*, *supra* note 6, ch. 6, at 1.

23. It should be noted that although dumping is considered a distortion of trade, antidumping duties are considered a nontariff barrier to trade. This is mainly because of the utilization of nontariff barriers to provide additional protection for domestic industry, rather than just to correct an unfair trade practice. Moreover, time-consuming administrative practices and abrupt and arbitrary applications of the duties increase their effectiveness. *Id.*

24. VINER, *supra* note 21, at 374.

25. *Id.* at 51-56.

26. *Id.* at 88-90.

27. *See, e.g.*, LEAGUE OF NATIONS WORLD ECONOMIC CONFERENCE, *ECON. & FIN.: REPORT AND PROCEEDINGS* (1927).

ports.²⁸ Similar legislation was passed in New Zealand in 1905²⁹ and in the Union of South Africa in 1914.³⁰ During the post World War I period, antidumping laws were enacted in the United States and Europe, prompted by the protectionist fears of ruinous German dumping. In 1916, the United States appended two sections to the Revenue Act which effectively extended the anti-price discrimination provisions of the 1914 Clayton Act to foreign commerce.³¹ In 1921, antidumping duties were statutorily levied on dumped imports by the United States,³² Australia,³³ and Great Britain.³⁴ By 1958, virtually all of the major trading nations had enacted antidumping provisions in one form or another.

2. Economic Aspects of Nontariff Trade Barriers.

The motivation for dumping is that the discriminating company can maximize its profits by charging different prices for essentially identical products. A similar rationale motivates price discrimination within a domestic market. Profit maximization under this scheme is furthered by the fact that dumping promotes a sectorization of markets. This allows goods to be sold to the low-price customers without sacrificing the benefits to be obtained from the high-price customers.³⁵ In general, profit maximization resulting from dumping will depend on three factors: 1) the demand for the firm's product in its own country and abroad; 2) the barriers available to prevent reentry into the home market; and 3) the nature of the company's cost structure.³⁶ Thus, the firm will be more likely to profit from dumping if the demand for the goods in the home market is not elastic, while the demand for the goods in the export market is relatively elastic.³⁷ If a company can take advantage of barriers designed to prevent the re-importation of the dumped products from foreign countries back into the company's home market, there is no need for concern

28. An Act to Amend the Customs Tariff of 1897, 1904, 4 Edw. 7, c. 11 (Can.).

29. The Agricultural Implement Manufacture, Importation and Sale Act, 1905, 5 Edw. 7, No. 58 (N.Z.).

30. Act of July 7, 1914, Concerning the Imposition of Customs Duties, No. 26, § 8 (S. Africa).

31. Revenue Act of 1916, ch. 463, § 800, 39 Stat. 798 (1916) (current version at 15 U.S.C. § 71 (1976)).

32. Antidumping Act, 1921, 42 Stat. 11, 19 U.S.C. §§ 160-73 (1976).

33. Customs Tariff (Industries Preservation) Act, 1921, ACTS AUSTL. P. No. 28 (1921).

34. Safeguarding of Industries Act, 1921, 11 & 12 Geo. 5, c. 47 (1921).

35. De Jong, *The Significance of Dumping in International Trade*, 2 J.W.T.L. 162, 168 [hereinafter cited as De Jong].

36. Fisher, *The Antidumping Law of the United States: A Legal and Economic Analysis*, 5 LAW & POL'Y INT'L BUS. 85, 87 (1973) [hereinafter cited as Fisher].

37. The economic theory behind this proposition is one of the basic supply and demand. If demand for the product in the home market can be maintained when the dumping company raises its prices and if the demand for the goods increases sharply by foreigners responding to lowered prices in their own markets, the company's profits will necessarily be maximized. *Id.* at 87.

that the home market would be ruined for the discriminating firm.³⁸ Finally, it is highly unlikely that a firm will engage in dumping unless the marginal revenue that it derives from foreign markets is substantially greater than its marginal costs of production for the dumped goods.³⁹ In order for this situation to occur, products must be produced at a decreasing marginal cost, *i.e.*, where production is based on economies of scale.⁴⁰

a. Economic Effects of Dumping on the Importing Country

The most severe effects of dumping are usually felt by competing producers of like goods in the country of importation. Economic harm to the affected competitor can be measured in terms of actual present injury, or the quantity of dumped goods multiplied by the margin of dumping.⁴¹ The economic effects of dumping can also be measured in terms of implied injury.⁴² Using this

38. The typical situation might be where a company in the United States buys the dumped goods and attempts to re-sell them in the higher priced market of the exporting country. Barriers to reimportation such as tariffs, quotas and other nontariff barriers will effectively protect the dumping firm from this type of threat. *Id.*

39. VINER, *supra* note 21, at 94-101.

40. Three separate types of dumping have been attributed to the concepts involved in marginal costs. They are: 1) sporadic dumping; 2) intermittent dumping; and 3) persistent dumping. VINER, *supra* note 21, at 94. Sporadic dumping is typically the unloading of overstock by a producer who prefers to dump his goods in a foreign market rather than endanger his domestic price structure. *Id.* at 23. It is of relatively little concern to the country dumped on. Intercommitment dumping involves an intent on the part of the producer to gain a foothold in the foreign market and eventually to eliminate competition in that market by selling at below marginal cost for brief periods. *Id.* at 26. After the foreign competitors are eliminated, the predatory dumper raises his prices above marginal cost. This practice has also been referred to as predatory dumping. *Id.* Persistent dumping involves a deliberate overproduction of merchandise at decreasing marginal costs. *Id.* The dumper has a continuous overstock which is then continually dumped in the foreign market. In these situations the firm may even be able to pass along the benefits of dumping to its home customers in the form of reduced prices. In practice however, the interests of the company and consumers are usually in opposition to each other with the company choosing to retain all its profits. Fisher, *supra* note 36, at 89.

In general, legal writers have seldom been willing to undertake the thorough economic analysis of the underlying motivations for dumping necessary to an understanding of why and to what extent the practice should be regulated. For exceptions, see Anthony, *The American Response to Dumping From Capitalist and Socialist Economies — Substantive Premises and Restructured Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159 (1969); Note, *The Antidumping Act - Tariff or Antitrust Law?*, 74 YALE L. J. 707 (1965). For a contrary analysis, see Barcelo, *Antidumping Laws as Barriers to Trade — The United States and the International Antidumping Code*, 57 CORNELL L. REV. 491 (1972) [hereinafter cited as Barcelo], and K. DAM, *THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION* (1970).

41. Under these situations, if a foreign company increased its share of the United States market by five percent through less than fair value (LTFV) sales, domestic industries producing like products would suffer a corresponding loss. See VINER, *supra* note 21, at 375.

42. A typical example of an implied injury would be as follows: a foreign company holds 15 percent of the domestic market in a given product both before and after the sale by that country of the product at LTFV sales, there is an implied injury to the domestic competitors to the extent of lost market opportunities. See Fisher, *supra* note 36, at 90.

analysis, the effects of dumping can be assessed by the amount of growth that would have taken place in the competing industry had no dumping occurred or, by the harm suffered by domestic industries which manufacture products that are not directly competitive with the dumped imports,⁴³ or by the harm occurring to the user industries in the importing country.⁴⁴

Most economic analyses of dumping fail to consider the potential benefits that may accrue to the importing country. The primary benefit is in the form of lower consumer prices for the dumped goods. In certain situations, the savings to the consumers can be substantial and relatively non-injurious to the entire economy.⁴⁵ Thus, if a domestic industry can adjust to the effect of dumping, the importing country may realize the net benefit from the increased efficiency and lower prices provided by the dumping. However, if the dumping also produces substantial inventory buildups or increases in unemployment, any benefits of dumping will be rendered nugatory.

This balancing test of injuries versus benefits has been incorporated into the antidumping laws which have adopted a material injury test. Since a domestic manufacturer must prove material injury as a prerequisite to the assessment of antidumping duties, the law automatically allows the beneficial aspects of dumping to permeate the economy up to the point that the benefits are outweighed by material harm to a domestic industry.⁴⁶

b. Economic Effects of Dumping on the Exporting Country

As previously discussed, generally a firm in the exporting country will profit from dumping.⁴⁷ Whether the exporting country itself will derive a benefit from dumping is another question.⁴⁸ In cases where the dumped goods are being produced at declining marginal costs, consumers in the dumping country

43. Economic harm in this situation arises because domestic consumers are tempted to purchase the dumped goods rather than the nondirectly competitive domestic goods. A typical example would be a situation in which the exporting country dumps television sets but not radios. Depending upon the relevant cross-elasticities of demand, the LTFV television sets will deflect consumer preferences away from radios in many instances and thus harm the domestic radio industry and the television industry. *Id.* at 91.

44. User industries which are unaware of the source of lower priced imports can be rendered dysfunctional if they have based their future cost and price determinations on a continuing supply of the dumped goods and such supply is terminated with no advance warning. *Id.*

45. Where dumping is sporadic, it has been suggested that the benefits of lower prices usually outweigh the marginal harm suffered by local industries. See Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Antidumping Duties*, 58 COLUM. L. REV. 43, 47 (1958). However, where dumping is intermittent or predatory, the substantial injury suffered by local industries usually outweighs the benefits resulting from lower consumer prices. *Id.* But see Barcelo, *supra* note 40.

46. For a complete discussion of the United States antidumping law and the material injury test, see § IV. E *infra*.

47. The necessary ingredients for making dumping profitable to an exporting firm are discussed in the text accompanying notes 27-31 *supra*.

48. See generally Fisher, *supra* note 36, at 89.

may realize lower prices if the firm passes along its increased profits.⁴⁹ However, if the goods are produced at increasing marginal costs, consumer prices in the exporting country will rise as the dumping firm compensates for relatively unprofitable foreign dumping.⁵⁰

c. Economic Effects of Dumping on Third Countries

One of the most compelling arguments for proscribing dumping is its pernicious effects on 'innocent' third countries. Producers of like products in third countries that are not dumped will suffer the same economic harm as domestic producers face when they attempt to compete with dumped goods in the country of importation: as demand for their products declines, inventories build, prices drop and profits disappear.⁵¹ Unlike firms in the importing country, firms in third countries will never receive any of the ancillary benefits from dumping, such as lower consumer prices. Thus, the economics of dumping have far reaching implications, some of which may transcend the immediate parties to threaten entire networks of trading partners.

III. ELIMINATING NONTARIFF BARRIERS:

THE TOKYO ROUND AND THE TRADE AGREEMENTS ACT OF 1979

The concern over dumping is no longer expressed in terms of its pernicious economic effects; instead concern is generated over the unfettered use of antidumping duties to remedy dumping.⁵² Following this analysis, antidumping duties are considered the real nontariff trade barrier rather than the underlying sales at less than fair value (LTFV). The reason for this is simple: the duties have been used to provide an added measure of protection for domestic industries, rather than to correct an unfair trade practice. Equally important, are the inefficient administrative practices and the abrupt and arbitrary applications of duties, that have made them a greater hindrance to free trade than dumping itself.

A. *The Tokyo Round of Multilateral Trade Negotiations*

Since the GATT was signed in 1947,⁵³ there have been periodic rounds of multilateral trade negotiations (MTN).⁵⁴ These rounds have attempted to im-

49. De Jong, *supra* note 35, at 170.

50. *Id.*

51. See Fisher, *supra* note 36, at 92.

52. See, e.g., GATT Doc. AD/W/90 2 (1979).

53. Oct. 30, 1947, 61 Stat. pt. 5, at All, T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1950).

54. Six previous rounds of MTN have taken place between the GATT contracting parties. These rounds have been labeled as follows: Geneva Round, 1947; Annecy Rounds, 1949; Torquay Round, 1950; Japanese Accession to the GATT, 1955; Dillon Round, 1960; and Kennedy round, 1964. See generally TRADE BARRIERS, *supra* note 6.

plement the declared intent of the original Agreement: to reduce tariffs between the contracting parties. These MTNs have substantially achieved their purpose.⁵⁵ However, the significant tariff reductions negotiated during these rounds did not affect the use of nontariff barriers. The effect of these nontariff barriers became more obvious as tariffs dropped to lower and lower levels. Moreover, the use of nontariff barriers by developed countries made it increasingly difficult for less developed countries to achieve any meaningful access to their markets.⁵⁶

In September 1973, the Ministers of more than 100 countries initiated the Tokyo Round⁵⁷ of trade negotiations with the intent of reducing or eliminating nontariff barriers which imposed such restraints on an effective system of international discipline.⁵⁸

B. *United States Participation in the Tokyo Round*

United States involvement in the Tokyo Round came about as a result of an infrequently used constitutional arrangement. The power to regulate commerce with foreign nations is specifically delegated to Congress.⁵⁹ However, Congress has sometimes delegated this authority to the President.⁶⁰ The Trade Act of 1974⁶¹ authorized the President to enter into the already launched Tokyo Round of trade negotiations for the purpose of establishing fairness and equity in international trading relations. The trade discussions included: the reform of rules governing international trade and the harmonization, reduction, and elimination of tariff and nontariff barriers to interna-

55. The following figures represent a percent of reduction in average tariff levels on industrial products as a result of the six previous rounds of negotiations: United States — 72.1; Canada — 58.2; Japan — 25.0; European Community — 44.3; United Kingdom — 59.6. *Id.* at 9.

56. *See generally* D. CLINE, *TRADE NEGOTIATIONS IN THE TOKYO ROUND: A QUANTITATIVE ASSESSMENT* (1978). It should be noted that developing countries were, for the most part, excluded from any tariff reductions agreed to in the Tokyo Round. *Id.*

57. Although the bulk of the negotiations took place in Geneva, Switzerland, this round of international trade talks was named for the ministerial conference which launched them in Tokyo, Japan. *Id.*

58. GATT Doc. MTN/NTM/W/236, (1979). Nontariff barriers are more difficult to negotiate than are tariff reductions. It has been suggested that this is due to at least three factors: 1) their complexity and subtlety, requiring a high degree of expertise even to identify the practices which might operate as nontariff barriers; 2) the difficulty of appraising the effect or concrete impact on trade, of either a nontariff barrier or an international rule regarding a nontariff barrier, thus making it difficult for national representatives at a negotiation to evaluate the "quid pro quo" or reciprocal balance of any set of obligations; and 3) the divergence of governmental and economic philosophies represented at the bargaining conference, such as to render it impossible to reach agreement on fundamental goals or assumptions. SENATE COMM. ON FINANCE, 96TH CONG. 1ST SESS., *MTN AND THE LEGAL INSTITUTIONS OF INTERNATIONAL TRADE* 1, S. DOC. NO. CP 96-14 (Comm. Print 1979).

59. U.S. CONST. art I, § 8, cl. 3.

60. *See, e.g.*, Trade Expansion Act of 1962, 19 U.S.C. § 1801 (1976).

61. 88 Stat. 1978 (1974) (codified in scattered sections of 19 U.S.C.).

tional trade. Another goal was to assure the United States of equal competitive opportunities in foreign markets.⁶²

The Act authorized the President to negotiate trade agreements providing for the reduction and elimination of nontariff barriers and other distortions of international trade, subject to procedures for the approval and implementation of such agreements by Congress.⁶³ The procedures set forth in the Act included amendments to the rules of the House and the Senate insuring consideration of the implementing legislation.⁶⁴ The Act also stated that the implementing legislation could not be amended once it was submitted to Congress by the President.⁶⁵ The President's apparent discretion was substantially mitigated by the Act's requirement for close consultation with the Congress. The President was required to consult with the House Committee on Ways and Means, the Senate Committee on Finance, and all other committees in both Houses exercising jurisdiction over any subject matter which would be affected by the trade agreements.⁶⁶

C. *The Results*

The Tokyo Round concluded on April 12, 1979 with the parties signing the agreements in Geneva. The agreements are comprised of codes which cover the following areas: subsidies and countervailing measures; antidumping measures; customs valuation; government procurement; technical barriers to trade; import licensing procedures; trade in civil aircraft; international dairy arrangements; bovine meat arrangements; and a group framework according more favorable treatment to developing countries.⁶⁷ This Recent Develop-

62. *Id.* § 2, 19 U.S.C. § 2102 (1976).

63. *Id.* § 102, 19 U.S.C. § 2112 (1976).

64. Special legislative procedures are established under §§ 151 and 152 of the Trade Act of 1974, 19 U.S.C. §§ 2191, 2192 (1976), for insuring consideration of the implementing legislation.

65. *Id.* § 102(d), 19 U.S.C. § 2112(d) (1976). This provision was enacted to avoid certain problems that arose after the Kennedy Round. The United States had been urged for some time to drop its American Selling Price System of customs valuation on certain imports. It agreed to this during the Kennedy Round but Congress did not ultimately approve the agreement. Further, a dispute between the Congress and the Executive branch on the International Antidumping Code and its relation to the domestic Antidumping Act convinced the Contracting Parties that previous negotiating procedures were futile if United States negotiators could not make commitments they were sure the Congress would both accept and implement in domestic law. *See generally* Pintos & Murphy, *Congress Dumps the International Antidumping Code*, 18 CATH. U. L. REV. 180 (1968).

The no-amendment provision also resulted in some rather high-intensity lobbying before the Trade Agreements Act of 1979 was submitted for Congressional approval. *See generally* Glenn, *Negotiating the Trade Pact at Home and Abroad*, NAT'L J. March 17, 1979, at 429.

66. Trade Act of 1974, § 102(c), 19 U.S.C. § 2112(c) (1976). For a detailed description of the consultations that took place between the Carter Administration and the Senate Finance Committee, *see* S. REP. NO. 96-249, 96th Cong., 1st Sess. 6 (1979).

67. The entire set of codes are contained in HOUSE COMM. ON WAYS AND MEANS AND SENATE

ment will only deal with the antidumping agreements. The agreements concerning the imposition of antidumping duties⁶⁸ are a re-codification of the old International Antidumping Code.⁶⁹ The Agreements call for the imposition of antidumping duties only after there is a finding of material injury to a domestic industry resulting from dumping.⁷⁰ In addition, certain procedures are established that insure the "speedy, effective and equitable" imposition of antidumping duties.⁷¹ A dispute settlement mechanism is also included.⁷² The Agreement makes no attempt to condemn dumping itself. Rather, the aim is to curb the protectionist application of antidumping laws.⁷³ In the United States, the implementing legislation for the agreements entered into in Geneva was the Trade Agreements Act of 1979 (Act of 1979).

D. *The Trade Agreements Act of 1979*

The Trade Act of 1979⁷⁴ approves and implements the trade agreements negotiated by the United States in the Tokyo Round of the MTN. Pursuant to the Trade Act of 1974,⁷⁵ the bill was developed in close consultation among the Office of the Special Representative for Trade Negotiations, the Subcommittee on Trade of the House Ways and Means Committee, the Senate Finance Committee and other interested committees of the two Houses.

The Act contains eleven titles, most of which implement a given provision of the MTN. For example, Title I of the Act is entitled "Countervailing and Antidumping Duties"⁷⁶ and corresponds to the MTN agreements concerning

COMM. ON FINANCE, 96TH CONG., 1ST SESS., MULTILATERAL TRADE NEGOTIATIONS, WMCP 96-18 (Comm. Print 1979).

68. See Proposed Revision of the Agreement on Implementation of Article VI, GATT Doc. AD/W/90 (1979) [hereinafter cited as Antidumping Agreement].

69. Agreement on Implementation of Article VI of GATT, *opened for signature* June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1968). For a discussion of this agreement, see note 94 *infra*.

70. Antidumping Agreement, *supra* note 68, art. 2.

71. *Id.* arts. 5, 8 and 10. For a discussion of these procedures and how the United States has incorporated them in its domestic law, see § IV *infra*.

72. Antidumping Agreement, *supra* note 68, art. 15.

73. *Id.* art. 1.

74. Pub. L. 96-39, 93 Stat. 144 (codified in scattered sections of 19 U.S.C.A.). The bill, H.R. 4537, 96th Cong., 1st Sess., 121 CONG. REC. H4, 765 (daily ed. June 19, 1979), was submitted to Congress by the President on June 19, 1979, where it was referred to the House Committee on Ways and Means and the Senate Committee on Finance. Each Committee issued a report wherein the bill was supported without change. See H. REP. NO. 96-317, 96th Cong., 1st Sess. (1979), and S. REP. NO. 96-249, 96th Cong., 1st Sess. 1 (1979). The bill became law on July 26, 1979.

75. See also § III.B *supra*.

76. The changes in United States antidumping practices as a result of the Act are discussed in § IV *infra*. Subtitle A of Title I implements new procedures in the assessment and imposition of countervailing duties. In a major departure from prior countervailing duty law, the Act now permits the Secretary of the Treasury to impose countervailing duties on subsidized products only if the ITC determines that a domestic industry is being materially injured by such subsidized imports. See generally S. REP. NO. 96-249, 96th Cong., 1st Sess. (1979).

those issues.⁷⁷ Title X on Judicial Review and Title XI concerning miscellaneous provisions do not implement specific MTN agreements, but rather clarify domestic procedures in these various areas.⁷⁸

IV. UNITED STATES ANTIDUMPING LAWS

A. History

The first legislative attempt to deal with the problem of dumped goods was section 801 of the Revenue Act of 1916.⁷⁹ At the end of World War I, the Wilson Administration feared that European cartels would attempt to destroy their smaller American competitors.⁸⁰ The 1916 Act was enacted to prevent unfair competition. The statute was directed at importers or "those assisting in importing" articles into the U.S.

at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the U.S., in the principal markets of the country of their production . . . with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States. . . .⁸¹

The statute, however, has never been invoked because of its vagueness. There has been no settled interpretation of who is included in the phrase "a person importing or assisting in importing,"⁸² and what degree of similarity between articles sold in the home country markets and those sold in the U.S. must be established.⁸³

Because of the difficulties of proof under the 1916 Act, and in response to complaints by American manufacturers that there was a flood of dumped imports on the American market, Congress enacted the Antidumping Act, 1921.⁸⁴ Generally, the Antidumping Act, 1921 required a determination by

77. See GATT Doc. MTN/NTM/W/236 (1979), and Antidumping Agreement, *supra* note 68. The other titles of the Act of 1979 which implement specific MTN agreements are as follows: Title II Customs Valuation; Title III Government Procurement; Title IV Technical Barriers to Trade (Standards); Title V Implementation of Tariff Schedules; Title VI Civil Aircraft Agreements; and Title VIII Treatment of Distilled Spirits. See Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 (1979).

78. See § IV.F *infra* for a discussion of judicial review of newly created antidumping procedures. Title XI on miscellaneous provisions contains a requirement that the President submit to Congress a plan for the restructuring of the Executive branch foreign trade policy-making and regulatory functions. Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144.

79. 15 U.S.C. § 72 (1976).

80. See Myerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167, 173-74 (1976) [hereinafter cited as Myerson].

81. 15 U.S.C. § 72 (1976).

82. Myerson, *supra* note 80, at 173.

83. *Id.*

84. § 201, 19 U.S.C. § 160 (1976).

the Treasury Department (Treasury) as to whether a certain class of goods was being, or was likely to be, sold at LTFV.⁸⁵ If the finding by Treasury was affirmative, customs appraisalment was withheld⁸⁶ and the case was turned over to the United States Tariff Commission⁸⁷ to determine whether there was, or was likely to be, injury to an American industry.⁸⁸ The Commission then conducted an investigation into the question of injury.⁸⁹ If an affirmative finding was reached, the case was returned to Treasury where the Secretary of the Treasury assessed a duty on the goods equal to the dumping margin.⁹⁰ This assessment was in addition to any duties otherwise applicable.

The latest modifications in United States antidumping laws are contained in the Act of 1979.⁹¹ Title I of the Act of 1979 provides for the repeal of the Antidumping Act, 1921 and the enactment of a new Title VII to the Tariff Act of 1930 (Act of 1930).⁹² The Act implements some substantive and several procedural changes in United States law.

Under the new law, antidumping duties are imposed when the administering authority (presently the Secretary of the Treasury) determines that a class or kind of merchandise is being, or is likely to be, sold in the United States at LTFV and the U.S. International Trade Commission (ITC) determines that an industry in the United States is materially injured, threatened with material injury, or that the establishment of an industry is materially retarded, by reason of imports of that tariff item.⁹³

B. Definitions

1. Injury

a. Materiality

One of the primary substantive changes made by the Act is the inclusion of a material injury test as a prerequisite to the assessment of antidumping duties. This was the standard that all member nations of GATT, except the

85. *Id.*

86. *Id.* § 201(b), 19 U.S.C. § 160(b)(1)(B) (1976).

87. *See* note 10 *supra*.

88. In 1954 the Antidumping Act, 1921 was amended so that the International Trade Commission, which was considered to have a certain expertise in such areas, would determine injury. Customs Simplification Act of 1954, 68 Stat. 1136 (1954) (current version at 19 U.S.C. § 160 (1976)).

89. Antidumping Act, 1921, § 201(a), 19 U.S.C. § 160(a) (1976).

90. 19 C.F.R. § 153.43 (1977).

91. Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 19 U.S.C.).

92. 19 U.S.C. §§ 1202-1654 (1976). References to the antidumping provisions of the Trade Agreements Act of 1979 will be referenced to the appropriate section of Title VII of the Tariff Act of 1930 unless otherwise indicated.

93. Tariff Act of 1930, § 731, 19 U.S.C.A. § 1673 (Supp. 1979).

United States, had applied under the International Antidumping Code.⁹⁴ The basic structure of this Code and most of its provisions were left unchanged by the MTN.⁹⁵

'Material Injury' is defined in the new provisions of the Act of 1930 as "harm which is not inconsequential, immaterial, or unimportant."⁹⁶ In making its injury determinations, the ITC is required to consider, *inter alia*, the volume of imports of the merchandise under question, the effect of such imports on United States prices of like products, and the impact of such imports on domestic producers.⁹⁷

In its evaluation of the first factor, the ITC is to consider whether the existing volume of imports, or an increase in the volume of the imports, is significant.⁹⁸ In evaluating any price effect, the ITC must consider whether

94. Agreement on Implementation of Article VI of GATT, June 30, 1967, 19 U.S.T. 4348, T.I.A.S. No. 6431 (effective July 1, 1978) [hereinafter cited as Antidumping Code]. The Antidumping Code was negotiated as an agreement to the elaborate provisions of Article VI of GATT, and concerned itself solely with curbing the protectionist application of antidumping laws. *Id.* art. 1. No attempt was made to condemn dumping itself. The Code had three major objectives: 1) to reduce the harassment value of antidumping proceedings; 2) to reduce the penal nature of provisional and final remedies; and 3) to ensure procedural fairness. *Id.* The Code sought to implement the first objective by requiring government officials to have evidence of both dumping and injury before they initiated any investigation. *Id.* art. 5(a). This requirement protected foreign competition from harassment by complainants who based their complaint on the basis of either dumping or injury. The Code required simultaneous investigations of both dumping and injury. *Id.* By allowing provisional remedies to be assessed against goods under investigation only if there had been an affirmative preliminary decision of dumping and if there was some evidence of injury on hand, the Code sought to implement the second objective of reducing the penal nature of provisional and final remedies. *Id.*

Procedural openness was ensured by the Code's requirement that both the foreign supplier and the local importer be given notice of the initiation of antidumping proceedings and that they be given a chance to present written evidence. *Id.* art. 6.

The Code also set standards restricting the protectionist interpretation of substantive aspects of dumping laws. In its definition of "industry" the Code included only like products in the domestic market. A "like product" was defined as a product "identical, that is alike in all respects to the dumped product under consideration." *Id.* art. 2(b).

The Code's standard for injury was a "material" injury. *Id.* art. 3(a). While the term "material" was not specifically defined, factors such as market share, profits, employment and utilization of capacity were all relevant in determining whether an injury was material. *Id.*

Finally, in order to ensure that there was a proper nexus between dumping and injury, the Code provided that dumped imports must be the principal cause of domestic injury. *Id.* art. 3(a).

Reluctant to change the procedures established by the 1921 Antidumping Act, Congress declared that the provisions of the Code could be considered law in the United States so long as they did not conflict with domestic law, and did not limit the discretion of the ITC in its injury determination function. See Renegotiation Amendment Act of 1968, 19 U.S.C. § 160 (1976). The overall effect of Congress' action was to render the International Antidumping code inapplicable to issues of dumping in the United States. See generally Barcelo, *supra* note 40; Pintos & Murphy, *supra* note 65; Long, *United States Law and the International Antidumping Code*, 3 INT'L LAW. 464 (1969).

95. Compare Antidumping Code, *supra* note 94, with Antidumping Agreement, *supra* note 68.

96. Tariff Act of 1930, § 771(7)(A), 19 U.S.C.A. § 1677(7)(A) (Supp. 1979).

97. *Id.* §§ 771(7)(B)(i), (ii), (iii), 19 U.S.C.A. §§ 1677(7)(B)(i), (ii), (iii) (Supp. 1979).

98. *Id.* § 771(7)(C)(i), 19 U.S.C.A. § 1677(7)(C)(i) (Supp. 1979).

domestic prices are being significantly undercut or suppressed.⁹⁹ Likewise, the new provisions direct the ITC to consider all relevant economic factors in assessing the impact of the dumped goods on the domestic industry.¹⁰⁰ Some of these economic factors are listed in the 1979 Act itself: 1) actual and potential decline in output, sales, market share, profits, productivity, return on investments, and under utilization of capacity;¹⁰¹ and 2) actual and potential negative effects on cash flow, inventories, employment, wages, growth, and ability to raise capital.¹⁰²

However, there are significant problems in the application of the new Act. The statutory requirements provide ambivalent guidance for the ITC in its injury determinations. Obviously, the significance of various economic factors is dependent upon the facts of each case. The House Ways and Means Committee recognized this point by stating that "Neither the presence nor absence of any factor listed in the [Act] can necessarily give decisive guidance with respect to an injury determination."¹⁰³ The complex economic, political and even sociological and psychological issues that surround certain industries make it imperative for the ITC to have a free hand in determining injury in particular cases. Thus, in one industry, a small volume of imports may have a significant impact on the market, while in another the same volume might not be significant. Likewise, for one type of product price may be the key factor in determining sales elasticity, with a rise in the amount of dumping having a decisive effect. The dumping margin may have no impact on other products.

While it does not advance any additional injury guidelines, the House Ways and Means Committee did state that recent ITC injury determinations have been consistent with a material injury standard.¹⁰⁴

b. Causation

Sales at LTFV must be a cause of material injury before dumping duties can be assessed. The Act of 1979 contains the same causation element as prior law: material injury must be "by reason of" the LTFV imports.¹⁰⁵ Under the Antidumping Act, 1921,¹⁰⁶ the causation standard ranged from a "con-

99. *Id.* § 771(7)(C)(ii), 19 U.S.C.A. § 1677(7)(C)(ii) (Supp. 1979).

100. *Id.* § 771(7)(C)(iii), 19 U.S.C.A. § 1677(7)(C)(iii) (Supp. 1979).

101. *Id.* § 771(7)(C)(iii)(I), 19 U.S.C.A. § 1677(7)(C)(iii)(I) (Supp. 1979).

102. *Id.* § 771(7)(C)(iii)(III), 19 U.S.C.A. § 1677(7)(C)(iii)(III) (Supp. 1979). With respect to argicultural products, the ITC must also consider any increased burden on government income or price support programs. *Id.* § 771(7)(D)(ii), 19 U.S.C.A. § 1677(7)(D)(ii) (Supp. 1979).

103. H. REP. NO. 96-317, 96th Cong., 1st Sess. 46 (1979) [hereinafter cited as HOUSE REPORT].

104. *Id.*

105. Compare Tariff Act of 1930, § 731(2)(B), 19 U.S.C.A. § 1673(2)(B) (Supp. 1979) with Antidumping Act, 1921, 19 U.S.C. § 160 (1976).

106. Antidumping Act, 1921, § 201, 19 U.S.C. § 160 (1976).

tributing cause" of injury to a finding of "mere contribution" to injury.¹⁰⁷ More recently, the standard required that LTFV sales must have caused more than a de minimis part of the entire injury, but the relationship between LTFV sales and injury need only have been identifiable.¹⁰⁸

In evaluating the causation element, *i.e.*, whether material injury is "by reason of" imports being sold at LTFV, the ITC examines the effects of such imports on the domestic industry. However, the ITC does not consider the effects of such factors as contraction in demand or changes in patterns of consumption, on a domestic injury.¹⁰⁹ If the ITC were to examine the causation issue in light of these other factors, relief would become more difficult to obtain for those industries facing a variety of problems. These same industries are the most vulnerable to dumped imports.¹¹⁰

c. Threat of Injury

The Act of 1930 provides for relief if the ITC determines that an industry is being threatened with material injury by reason of dumped imports.¹¹¹ This provision is intended to permit relief before actual material injury occurs, as well as to prevent actual injury from occurring.

The House Ways and Means Committee has stated that an affirmative determination in such cases should be based upon evidence showing that the threat is "real and imminent and not [based] upon mere supposition or conjecture."¹¹² Thus, the ITC might look for evidence of trends, such as the rate of increase of the dumped goods into domestic markets, or other indications that a particular situation could develop into actual material injury.¹¹³

107. *Compare* Pig Iron from East Germany, Czechoslovakia, Romania and the U.S.S.R., 33 Fed. Reg. 14,664 (1968), *with* UNITED STATES TARIFF COMM'N, PRIMARY LEAD METAL FROM AUSTRALIA AND CANADA 639 (1974).

108. This standard was developed because of the ITC's practice of cumulating the injurious effect of dumped goods on an industry from various countries rather than measuring the effect of dumped goods from countries individually. *See* Electric Golf Cars from Poland, 40 Fed. Reg. 49,153 (1975). Thus, assessment of dumping duties could follow a determination by the ITC that the dumping of goods by a certain country was an identifiable cause of injury to a domestic industry. *Id.*

109. HOUSE REPORT, *supra* note 103, at 47.

110. This does not preclude the ITC from considering evidence presented to it which indicated that the harm attributed by a domestic interest to the dumped imports is actually attributable to factors such as a change in demand, a change in consumption patterns or even increased competition in the market. *Id.* This does not imply however, that the domestic interest would bear the burden of providing that material injury is *not* caused by these other factors. *See Id.*

111. Tariff Act of 1930, § 731(2)(A)(ii), 19 U.S.C.A. § 1673(2)(A)(ii) (Supp. 1979).

112. HOUSE REPORT, *supra* note 103, at 47.

113. The Committee stresses that an increase in market penetration is an early warning signal of injury, and warns the ITC to be wary of the rate of increase in market penetration, particularly if such penetration is achieved by prices which are below United States price levels. *Id.* at 48. The Committee also states that the absence of these trends or high present utilization of capacity in capacity in the domestic industry should not be conclusive as to the absence of threat of material injury. *Id.* at 74.

2. Industry

The new provisions of the Act of 1930 continue prior usage of the term 'industry' holding it generally to refer to all the domestic producers who produce products like the product subject to the investigation, or products most similar in characteristics and uses to the merchandise under investigation.¹¹⁴ The term also includes producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product.¹¹⁵

Since this definition is left largely unchanged from previous law, it is useful to survey the ITC's past interpretations of the term. The ITC originally considered industries on a national rather than regional basis. However, the ITC's interpretation of 'industry' has since ranged from a national standard, in situations involving a single domestic producer,¹¹⁶ to a regional standard, where the Commission considered the effect of future sales only in a given geographical region.¹¹⁷ The ITC extended this regional industry standard to the extreme case of finding injury to an industry in a case where only 5.5 percent of consumption in a given area was accounted for by imports, and where these imports represented only 0.05 percent of national consumption.¹¹⁸ These findings reflected the attitude of the ITC that an injury to a part of the national industry was an injury to the whole industry.¹¹⁹ In *Titanium Sponge from the U.S.S.R.*,¹²⁰ the ITC held that an industry was injured, but applied its finding only to the sponge-producing facility of the two producers.¹²¹

Recently, the Commission has commenced using a definition of 'industry' that is quite different that its use of regional and industrial segmentation to measure impact. This new theory measures the impact in more than one industry simultaneously.

This new approach aggregates injury in different industries to reach what

114. Tariff Act of 1930, § 771(4)(A) and § 771(10), 19 U.S.C.A. § 1677(4)(A)(10) (Supp. 1979).

115. *Id.* § 771(4)(A), 19 U.S.C.A. § 1677(4)(A) (Supp. 1979).

116. *See* Steel Jacks from Canada, 31 Fed. Reg. 11,197 (1966).

117. In Steel Reinforcing Bars from Canada, 29 Fed. Reg. 3,840 (1964), a determination of likelihood of injury to a national industry was made even though only the future effect of sales in the Pacific Northwest region of the United States was considered by the ITC. *Id.* The same reasoning was applied in U.S. INT'L TRADE COMM'N, Hollow or Cored Ceramic Brick and Tile from Canada, U.S.I.T.C. publication 785 (1976).

118. Steel Bars, Reinforcing Bars and Shapes from Australia, 35 Fed. Reg. 4,161 (1970).

119. *Id.* at 4,162.

120. 33 Fed. Reg. 10,769 (1968).

121. *Id.* It is questionable whether in cases where only one sector of a market is being injured, that region only and not producers in other areas should be assisted by the levying of dumping duties despite the fact that the U.S. CONST. art. I, § 8, cl. 1 requires the uniform assessment of duties among the states. In *Imbert Imports, Inc. v. United States*, 314 F. Supp. 784 (Cust. Ct. 1970), *aff'd*, 331 F. Supp. 1400 (Cust. Ct. 1971), the trial court held that duties must be assessed by the ITC on a geographically uniform basis. This question was not addressed on appeal. *See Imbert Imports, Inc. v. United States*, 475 F.2d 1189 (C.C.P.A. 1973).

the Commission considers to be a significant level.¹²² Since Congress has not expressed any dissatisfaction with this approach, it may be assumed that the ITC will continue to interpret the term 'industry' in this way under the Act of 1979.

3. Less Than Fair Value Sales

The Act contains no specific definition of LTFV sales. Rather, the term includes several concepts which are separately defined in the Act.

First, there is the situation where the purchase price, or exporter's sales price of an item in the United States, is less than the price at which similar merchandise is sold for consumption in the country of exportation.¹²³ Under prior law, a distinction between the purchase price and the exporter's sale price was made in contemplation of sales by a manufacturer to a related importer.¹²⁴ Thus, the purchase price was used when an importer unrelated to the manufacturer made an arms-length purchase, the purchase price being the net f.o.b. factory price to the importer.¹²⁵ The exporter's sales price was used when the importer was related to the manufacturer either as an agent or as a subsidiary.¹²⁶

The Act of 1979 provides a new term — 'United States Price'¹²⁷ — which is an amalgamation of the previous terms 'purchase price' and 'exporter's sales price.' However, the Act of 1979 modifies the meaning of purchase price to mean the price at which the merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States.¹²⁸ The purpose of this change is to provide statutory authority for the administrative practice which uses the producer's sale price to an unrelated middleman as the purchase price if a producer knew that the merchandise was intended for sale to an unrelated purchaser in the United States under terms of sale fixed on or before the date of importation.¹²⁹

122. *See, e.g.*, Lock-In Amplifiers and Parts Thereof from the United Kingdom, 40 Fed. Reg. 28,876 (1975).

123. *See* 19 C.F.R. § 153.22 (1979). Where the quantity of the goods sold for consumption in the home market (country of exportation) is so small as to be negligible and an inadequate basis of comparison for the price of goods sold in the United States, then the purchase price or exporter's sales price to third countries will be the basis of comparison. 19 C.F.R. § 153.3 (1979).

124. Antidumping Act, 1921, § 204, 19 U.S.C. § 163 (1976).

125. *Id.* § 203, 19 U.S.C. § 162 (1976).

126. *Id.* § 204, 19 U.S.C. § 163 (1976).

127. *See* Tariff Act of 1930, §§ 731(2), 772(d), 19 U.S.C.A. §§ 1673(2), 1677a(d) (Supp. 1979), where antidumping duties are required to be imposed in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise.

128. *Id.* § 772(b), 19 U.S.C.A. § 1677a(b) (Supp. 1979).

129. HOUSE REPORT, *supra* note 103, at 75. This provision allows the purchase price to be used if transactions between related parties indicate that the merchandise has been sold prior to importation to a United States buyer unrelated to the producer.

4. Foreign Market Value

Foreign market value (FMV) is the term used to describe the value against which the United States price is compared in assessing antidumping duties.¹³⁰ Under the Antidumping Act, 1921, the price of goods in the United States was compared with the FMV.¹³¹ The FMV consisted of the value of comparable goods sold in the exporter's home markets, third country markets, or an artificially constructed value.¹³² The present Act extends the concept of FMV to embrace both the existing term 'FMV' and 'constructed value'. In addition, the Act of 1979 does away with the statutory preference for the use of third country prices over constructed value.¹³³ The Secretary may now use either standard if the exporter's home market prices are either unavailable or inadequate for purposes of calculating FMV.¹³⁴

This change is due to the problems inherent in using third country market prices. For example, where sales in the exporter's home market are below the cost of production, prior law directed the Secretary to use third country prices as a basis of comparison.¹³⁵ Frequently, however, if a producer is selling below cost in his home market, he will also be selling below cost in export markets. In these cases, the use of third country prices would not be an effective basis of comparison.¹³⁶

The Act of 1979 also allows the Secretary to use generally accepted averaging and sampling techniques in determining FMV.¹³⁷ This provision is meant to ease the administrative burden of assessing antidumping duties on an entry-by-entry basis.¹³⁸

130. Tariff Act of 1930, §§ 731(2), 773, 19 U.S.C.A. §§ 1673(2), 1677(b) (Supp. 1979).

131. Antidumping Act, 1921, § 205, 19 U.S.C. § 164 (1976).

132. *Id.* 'Constructive Value' is used in those situations in which the available information concerning the sales in the home market or to third countries is either inadequate or irrelevant, as in the case of state controlled economies. 19 C.F.R. § 153.7 (1979). Here, the foreign government sets wages, material costs, sales prices and profit margins, and prices generally do not reflect the results of market place competition. In situations like this, the Secretary will either use prices at which similar merchandise of an uncontrolled economy is sold for, or he will make a determination of a constructed value to compare with the United States price. *Id.* This value is constructed on the basis of normal costs, expenses and profits as they are reflected in the prices of the same or similar merchandise sold for consumption in or by other countries. *Id.*

133. Tariff Act of 1930, § 773(a)(2), 19 U.S.C.A. § 1677b(a)(2) (Supp. 1979).

134. *Id.*

135. Antidumping Act, 1921, § 205, 19 U.S.C. § 164(b) (1976).

136. The House Ways and Means Committee has stated, however, that third country prices will still be preferred over constructed value if presented in a timely manner and if adequate to establish FMV. HOUSE REPORT, *supra* note 103, at 76.

137. Tariff Act of 1930, § 773(4), 19 U.S.C.A. § 1677(4) (Supp. 1979).

138. Because of the potential for abuse if it is not strictly circumscribed, this provision is limited to those cases where the need is the greatest, *e.g.*, cases involving a large number of sales. HOUSE REPORT, *supra* note 103, at 76.

V. PROCEDURES UNDER THE 1979 TRADE ACT

A. *Investigation*

The first step in the antidumping procedure is an investigation into the facts of a particular dumping situation by the Secretary of the Treasury (Secretary). This investigation may be initiated in one of two ways: 1) by the Secretary acting on his own initiative,¹³⁹ or 2) upon receipt of a petition filed on behalf of a domestic industry by an interested party.¹⁴⁰

1. Initiation of Investigation by Secretary of Treasury

The Secretary of Treasury is required to initiate an investigation whenever it is determined that such action is warranted. Such an investigation may be instigated by reports from district directors of Customs, who are required to report to the Commissioner of Customs if they are aware of any grounds for a reason to believe or suspect that any merchandise is being or is likely to be imported into the United States at LTFV.¹⁴¹ While self-initiation of investigations was permissible under previous law,¹⁴² in practice the Secretary initiated the investigation only upon receipt of a petition. The House Ways and Means Committee has expressed its dissatisfaction with this practice and has declared its firm intent that the self-initiation provision be implemented.¹⁴³ In view of this commitment to the self-initiation of investigations, the Committee stated that the standard to be applied in exercising the provision is less rigorous than the 'reasonable indication' standard which serves as the basis for a preliminary determination of LTFV.¹⁴⁴ Moreover, the Committee stressed

139. Tariff Act of 1930, § 732(a), 19 U.S.C.A. § 1673a(a) (Supp. 1979).

140. *Id.* § 732(b), 19 U.S.C.A. § 1673(b) (Supp. 1979).

141. 19 C.F.R. § 153.25 (1979). Under the regulations enacted pursuant to the Antidumping Act, 1921, the Customs Service official in charge of the antidumping proceedings while they were still in the Customs stage was the "case handler". His duties included preparing and transmitting a questionnaire to the parties under investigation, instructing Customs representatives about the supplied data and occasionally going abroad to participate in the investigation. *Id.* The case handler's main purpose was to hold a series of disclosure conferences with each of the interested parties at which all of the accumulated data which was not confidential was made available. These disclosure conferences were conducted without any formal procedural safeguards — no rules of evidence were applied and no transcript of the proceedings was issued. During the conferences, the case handler submitted his tentative views concerning the disposition of the case to the parties. Additional disclosure conferences were held if, in response to what was learned at the initial conference, a party submitted additional data. At the conclusion of these conferences the case handler prepared a memorandum in which he recommended disposition of the case. The memorandum was reviewed and refined by supervisory personnel and the recommendations of the Customs Service were then forwarded to the Office of Tariff and Trade Affairs in the Treasury Department. *See* 19 C.F.R. 153.25 (1979).

142. *See* Antidumping Act, 1921, § 201(a), 19 U.S.C. § 160(a) (1976).

143. HOUSE REPORT, *supra* note 103, at 59. The Committee stated that any regulation relating to the self-initiation provision is not to become a "dead letter." *Id.*

144. *Id.* *See also* Tariff Act of 1930, § 733(b), 19 U.S.C.A. § 1673b(b) (Supp. 1979).

that the Secretary should not rule out an investigation simply because a domestic industry has not requested one.¹⁴⁵

2. Initiation of Investigation by Petition

A preliminary investigation into an allegation of dumping may also be initiated by the Secretary upon receipt of a petition filed on behalf of domestic industry by an interested party.¹⁴⁶ The petition must allege that imports are being or are likely to be sold in the United States at LTFV, and that a domestic industry is being or is likely to be materially injured, or that the establishment of such an industry is being retarded by reason of the dumped imports.¹⁴⁷ The petition must be accompanied by information supporting these allegations which is reasonably available to the petitioner. Under previous regulations, an interested party was required to provide detailed descriptions of the goods involved, the fair value of the goods in the exporting country and injury information relating to the impact on domestic manufacturers.¹⁴⁸ There had been substantial criticism of these petition requirements as being onerous to the point of precluding petitioners who had meritorious complaints from obtaining their legal remedy.¹⁴⁹

The addition of the language in section 732(b), requiring the petitioner to include only information which is 'reasonably available,' is a reflection of Congressional concern over this matter. The House Ways and Means Committee has indicated that an evaluation of what information is reasonably available will be made on the basis of the resources of the individual petitioner, although the petitioner will be expected to use reasonable efforts to collect information from public and industry sources.¹⁵⁰ After receipt of the petition, the Secretary has twenty days within which to determine whether or not to initiate an investigation.¹⁵¹ If the determination is negative, the Secretary notifies the petitioner and the ITC and terminates the proceedings.¹⁵² If the determination is affirmative, the Secretary begins LTFV investigations and

145. HOUSE REPORT, *supra* note 103, at 59.

146. Tariff Act of 1930, § 732(b), 19 U.S.C.A. § 1673a(b) (Supp. 1979). Section 771(a), 19 U.S.C.A. § 1677(a) (Supp. 1979), defines "interested party" as a manufacturer in the United States of a product like the one which is being dumped; a certified labor union which is representative of an industry engaged in the manufacture in the United States of a like product; or a trade or business association a majority of whose members manufacture a like product in the United States. *Id.*

147. *Id.* § 732(b), 19 U.S.C.A. § 1673(b) (Supp. 1979).

148. 19 C.F.R. § 153.27 (1979).

149. *See, e.g.,* Myerson, *supra* note 80, at 192.

150. HOUSE REPORT, *supra* note 103, at 60.

151. Tariff Act of 1930, § 732(c), 19 U.S.C.A. § 1673a(c) (Supp. 1979). Under the Antidumping Act, 1921, § 321(a)(2), 19 U.S.C. § 160(c)(1) (1976), the Secretary had 30 days in which to make this determination.

152. Tariff Act of 1930, § 732(c)(3), 19 U.S.C.A. § 1673a(c)(3) (Supp. 1979).

publishes notices of this in the Federal Register.¹⁵³ The Act further requires Treasury to make available to the ITC all information it has relating to the investigation.¹⁵⁴

B. *Preliminary Determinations*

In every case in which the Treasury Department has commenced an investigation, the ITC is required to make a determination within 45 days of either the date on which the petition was filed, or the date on which the Secretary of the Treasury initiated an investigation.¹⁵⁵ The Antidumping Act, 1921,¹⁵⁶ required a preliminary referral to the ITC only if the Secretary concluded that there was substantial doubt as to the question of injury. The ITC then had 30 days within which to determine whether there was a reasonable indication of injury. The purpose of the new provision is to make United States law consistent with the Tokyo Round Agreements. These Agreements permit the imposition of provisional measures such as suspension or liquidation of imports and the posting of a cash deposit, bond, or other security on each entry subject to the suspension, after an affirmative preliminary determination of sales at LTFV and material injury.¹⁵⁷ The Act requires that the ITC provide interested parties a reasonable opportunity to present their views, although not necessarily in a formal hearing. A formal hearing is required prior to the final determination.¹⁵⁸ Notice of the ITC's determination is to be published in the Federal Register.¹⁵⁹ If the determination is negative, all proceedings are terminated.¹⁶⁰

The Act further requires the Secretary of the Treasury to make a preliminary determination of whether there is a reasonable basis to believe or suspect that imports are being sold at LTFV.¹⁶¹ The standard of 'reason to believe' in this instance is satisfied if, based on the information available, it can be reasonably concluded that sales at LTFV will be found when a final determination is reached.¹⁶² This section changes prior law by requiring that

153. *Id.* § 732(c)(2), 19 U.S.C.A. § 1673a(c)(2) (Supp. 1979). Pursuant to 19 C.F.R. § 153.30 (1979), if the Secretary determined that an investigation should be initiated, he was required to issue an "Antidumping Proceeding Notice" in the Federal Register within 30 days. *Id.* This notice had to include a description of the merchandise involved, a statement that there is sufficient evidence on record concerning injury to, or the retardation of establishment of, an industry in the United States. *Id.*

154. Tariff Act of 1930, § 732(d)(2), 19 U.S.C.A. § 1673a(d)(2) (Supp. 1979).

155. *Id.* § 733(a), 19 U.S.C.A. § 1673b(a) (Supp. 1979).

156. § 202(a), 19 U.S.C. § 160(c)(2) (1976).

157. HOUSE REPORT, *supra* note 103, at 61.

158. *Id.*

159. Tariff Act of 1930, § 733(f), 19 U.S.C.A. § 1673b(f) (Supp. 1979).

160. *Id.* § 733(a), 19 U.S.C.A. § 1673b(a) (Supp. 1979).

161. *Id.* § 733(b)(1), 19 U.S.C.A. § 1673b(b)(1) (Supp. 1979).

162. HOUSE REPORT, *supra* note 103, at 61.

the preliminary determination of sales at LTFV be made within 160 days after the date on which a petition was filed or after the Secretary initiated an investigation, rather than within 6 months after the initiation of the investigation.¹⁶³

1. Time Extensions

The Act retains the authority contained in prior law to extend the period within which a preliminary determination must be made. Previously, the Secretary was allowed to take an additional nine months to make a preliminary determination if he concluded that it could not reasonably be determined within 6 months.¹⁶⁴ The Act of 1979 extends the period within which the preliminary determination must be made to the 210th day after the filing of the petition or after a self-initiated investigation.¹⁶⁵ Thus, the Secretary may postpone the date of the preliminary determination upon a timely request of the petitioner¹⁶⁶ or in an extraordinarily complicated case.¹⁶⁷ A case falls within the latter category by reason of the number and complexity of the transactions to be investigated or adjustments to be considered, the novelty of the issues presented, or the number of firms whose activity must be investigated.¹⁶⁸ Congress has expressed its opinion that the period generally allowed for the preliminary determination is sufficient for all but the most complicated cases.¹⁶⁹ Further, it warned against the use of the time extension

163. Tariff Act of 1930, § 733(b)(1), 19 U.S.C.A. § 1673b(1) (Supp. 1979). Under prior regulations, 19 C.F.R. § 153.35(b) (1979), the Office of Tariff and Trade Affairs of the Treasury Department reviewed the recommendations of the Customs Service and issued a tentative disposition which took one of three forms: first, a tentative negative determination could have issued; second, if the firms under investigation agreed to it, customs appraisement could be withheld for at least three months but no more than six months pending a final determination of whether there were sales at LTFV (this was the usual practice); third, if no such agreement was reached, the final determination of sales at LTFV was issued simultaneously with the withholding of appraisement. *Id.* If a tentative affirmative decision was reached, the interested parties were given another chance to submit additional information at a hearing over which the Assistant Secretary of the Treasury for Tariff and Trade Affairs presided. *Id.* The additional information gleaned from this hearing was reviewed by the Assistant Secretary and his staff from which a final determination of LTFV sales issued. *Id.* An affirmative decision resulted in the case being referred to the International Trade Commission for consideration of the injury issue pursuant to 19 C.F.R. § 153.41 (1979). The Secretary of the Treasury retained the power to revoke or modify a finding of sales at LTFV up until an International Trade Commission finding injury was made. 19 C.F.R. § 153.42 (1979).

164. Antidumping Act, 1921, § 201(b), 19 U.S.C. § 160(b)(2) (1976).

165. Tariff Act of 1930, § 733(c)(1), 19 U.S.C.A. § 1673b(c)(1) (Supp. 1979).

166. *Id.* § 733(c)(1)(A), 19 U.S.C.A. § 1673b(c)(1)(A) (Supp. 1979).

167. *Id.* § 733(c)(1)(B)(i), 19 U.S.C.A. § 1673b(c)(1)(B)(i) (Supp. 1979).

168. *Id.* §§ 733(c)(1)(B)(i)(I)-(III), 19 U.S.C.A. §§ 1673b(c)(1)(B)(i)(I)-(III) (Supp. 1979). An example of a case meeting the last requirement is fresh winter vegetables from Mexico, 43 Fed. Rep. 48,753 (1978), a case involving fresh winter vegetables from Mexico grown by several thousand producers.

169. HOUSE REPORT, *supra* note 103, at 61.

provision as a way of avoiding what is called the 'clear and reasonable' time limits established in the Act of 1979 for reaching a preliminary determination.¹⁷⁰

The time periods contained in the 1979 Act are stated in terms of the maximum time available to both the Secretary and the ITC within which to make their determinations.¹⁷¹ Congress expects that if the determinations required under the Act can be made in a more timely fashion that they be done so.¹⁷²

2. Preliminary Review and Waiver of Verification

The Secretary is required to appoint an official to review the information developed during the first 60 days of an investigation for the purpose of determining whether such information forms a reasonable basis for the preliminary decision.¹⁷³ The same section allows a petitioner, or any interested party to whom such information is disclosed, to furnish an irrevocable written waiver of verification¹⁷⁴ of such information to the Secretary. This must be accompanied by an agreement that the party is willing to have a preliminary determination made on the basis of the record then available to Treasury. If both of these items are furnished, a preliminary determination must be made within 90 days after the date on which the investigation was commenced.¹⁷⁵ The House Committee on Ways and Means indicated that it is in the interest of all parties to waive the verification in order to expedite the lengthy verification process.¹⁷⁶ The Committee adds a caveat by recommending waiver of verification only in situations where the interested parties believe that the margins of dumping determined on the basis of such unverified information will be reasonably accurate.¹⁷⁷ The Committee further indicated that the irrevocable waiver of verification is only to be applied to the information actually disclosed to the petitioner.¹⁷⁸ Information not disclosed in this manner¹⁷⁹ and information subsequently provided must independently be verified

170. *Id.*

171. *Id.* at 62.

172. *Id.*

173. Tariff Act of 1930, § 733(b)(2), 19 U.S.C.A. § 1673(b)(2) (Supp. 1979).

174. *Id.* § 776, 19 U.S.C.A. § 1677e (Supp. 1979), requires that all information relied on by the Secretary in making a final determination regarding LTFV sales must be verified unless, with respect to an antidumping proceeding, verification is waived. If the Secretary is not able to verify the information submitted, he must rely on the best information available, which may include the information submitted in the petition. Similarly, whenever a party or any other person refuses or is unable to produce information in a timely manner and in the form required, or otherwise significantly impedes an investigation, the Secretary and the ITC must use the best information available.

175. *Id.* § 733(b)(2), 19 U.S.C.A. § 1673b(b)(2) (Supp. 1979).

176. HOUSE REPORT, *supra* note 103, at 62.

177. *Id.*

178. *Id.*

179. Confidential information is not disclosed in the course of antidumping proceedings. 19

if the Secretary relies on it in making the final determination.¹⁸⁰ Notice of the preliminary determination must be published in the Federal Register and given to the petitioner (if any) and other parties to the investigation.¹⁸¹

Following an affirmative preliminary determination, the liquidation of entries of merchandise under investigation is suspended.¹⁸² This procedure is identical to prior law.¹⁸³ The Act changes the law by explicitly authorizing the Secretary to require the posting of a cash deposit, bond, or other security,¹⁸⁴ as deemed appropriate to ensure protection of the anticipated dumping duties.¹⁸⁵

3. Retroactive Assessments

Under prior law, the Secretary had complete discretion to assess antidumping duties retroactively on unliquidated entries of merchandise entered before the notice of suspension of liquidation.¹⁸⁶ The Secretary could apply a suspension of liquidation order to unliquidated entries entered not more than 120 days prior to the date of initiation of an investigation.¹⁸⁷ If a dumping finding was ultimately reached, the Secretary was required to assess appropriate dumping duties with respect to all entries for which liquidation was suspended.¹⁸⁸

The Act of 1979 changes prior law both procedurally and substantively with regard to the retroactive assessment of antidumping duties.¹⁸⁹ This change makes United States law consistent with the amended Antidumping Agreement in the recently concluded MTN.¹⁹⁰ The section requires that the retroactive application of the order to suspend liquidation to unliquidated entries be made not more than 90 days prior to the date of the notice of the suspension order if critical circumstances are found to exist.¹⁹¹ Critical circumstances ex-

C.F.R. § 153.23 (1979) sets standards for determining whether information is confidential. Information is considered confidential if its disclosure would be of significant competitive advantage to a competitor or would have a significant adverse effect upon a person supplying the information or upon a person from whom the information was acquired. *Id.*

180. HOUSE REPORT, *supra* note 103, at 62.

181. Tariff Act of 1930, § 733(f), 19 U.S.C.A. § 1673b(f) (Supp. 1979).

182. *Id.* § 733(d)(1), 19 U.S.C.A. § 1673b(d)(1) (Supp. 1979).

183. Antidumping Act, 1921, § 201(b), 19 U.S.C.A. § 160(b)(1)(B) (1976).

184. *E.g.*, a letter of credit.

185. Tariff Act of 1930, § 733(d)(2), 19 U.S.C.A. § 1673b(d)(2) (Supp. 1979). The Treasury Department has stated its intent to require cash deposits only in those cases where it believes that bonds or other forms of security will not adequately protect the anticipated dumping duties. HOUSE REPORT, *supra* note 103, at 62. Since a finding of injurious dumping has not been finally determined at this point in the investigation, the requirement of a case deposit might represent an onerous burden to the importer and so stir up needless international economic anxiety. *Id.*

186. Antidumping Act, 1921, § 201(b), 19 U.S.C. § 160(b)(1)(B) (1976).

187. *Id.*

188. *Id.*

189. Tariff Act of 1930, § 733(e)(2), 19 U.S.C.A. § 1673b(e)(2) (Supp. 1979).

190. See Antidumping Agreement, *supra* note 68.

191. Tariff Act of 1930, § 733(e)(2), 19 U.S.C.A. § 1673b(e)(2) (Supp. 1979).

ist: 1) where there is a history of dumping, in the United States or elsewhere, of the merchandise under investigation; 2) where the importer knew or should have known that the exporter was selling the merchandise at LTFV; or 3) where there have been massive imports of the merchandise over a relatively short period and the industry is being materially injured by reason of such imports.¹⁹² This provision was designed to provide prompt relief to domestic industries suffering from a large volume of imports over a very short period of time.¹⁹³ It is also intended to deter exporters of merchandise that is subject to an investigation from circumventing the intent of the law by increasing their exports to the United States during the period between the initiation of an investigation and a preliminary determination by Treasury.¹⁹⁴

C. *Termination of Investigation*

The Act of 1979 provides for the termination of an investigation by the Secretary or the ITC upon the withdrawal of the petition requesting an investigation, but not before a preliminary determination has been reached.¹⁹⁵

D. *Suspension of Investigation*

An investigation may be suspended prior to a final determination by the Secretary on the issue of dumping in two instances. First, if exporters accounting for substantially all of the imports of the merchandise under investigation voluntarily agree to eliminate dumping, or to cease exports of the merchandise to the United States within 6 months of suspension of the investigation.¹⁹⁶ Second, if extraordinary circumstances are present, and the exporters described above agree to revise prices so as to completely eliminate the injurious effect of the imports of the merchandise under investigation. Upon being petitioned, the ITC may review such agreements.¹⁹⁷ If it determines that the injurious effect has not been eliminated, the investigation must be completed.¹⁹⁸ If the Secretary determines that an agreement which resulted in a suspension of an

192. *Id.* § 733(e)(1), 19 U.S.C.A. § 1673b(e)(1) (Supp. 1979). A history of dumping may be found to exist if the class or kind of merchandise under investigation was subject to a dumping finding whether in the United States or in another country. *Id.*

193. HOUSE REPORT, *supra* note 103, at 63.

194. *Id.*

195. Tariff Act of 1930, § 734(a), 19 U.S.C.A. § 1673c(a) (Supp. 1979).

196. *Id.* § 734(b), 19 U.S.C.A. § 1673(b) (Supp. 1979). The House Ways and Means Committee intends the phrase "exporters accounting for substantially all the imports of the merchandise" to mean exporters accounting for at least 85 percent of the imports during the most recent representative period. HOUSE REPORT, *supra* note 103, at 64. The validity of the agreement depends on the continuous fulfillment of this requirement. Thus, if the exporters who are party to the agreement cease at any time to represent at least 85 percent of the imports of the merchandise, the agreement will cease to have effect. *Id.*

197. Tariff Act of 1930, § 734(c), 19 U.S.C.A. § 1673c(c) (Supp. 1979).

198. *Id.*

investigation is being violated, then the investigation shall be resumed. Unliquidated imports of the merchandise become liable for antidumping duties retroactively if entered on or after the later of 90 days before the date of the affirmative preliminary determination or the date of the violation.¹⁹⁹

1. Agreements Eliminating Sales At LTFV

Section 734(b) of the Act of 1930 permits the Secretary to suspend an investigation by accepting an agreement that provides for the cessation of exports of the merchandise within 6 months, or for an immediate revision in prices which results in the complete elimination of the dumping margin. This agreement must contain an anti-surge provision to preclude circumvention of the purpose of the agreement.²⁰⁰ The anti-surge provision prevents exporters from flooding the market immediately after an agreement has been reached. It must guarantee that the quantity of merchandise entered during the period provided for cessation of exports does not exceed the quantity exported during the most recent representative period.

2. Agreements Eliminating the Injurious Effect of Dumping

In certain extraordinary circumstances,²⁰¹ the Secretary may accept a price agreement which does not completely eliminate the dumping margin so long as the Agreement completely eliminates the injurious effect of the dumped im-

199. Under 19 C.F.R. § 153.33 (1979), the Secretary discontinued an investigation at any time if he was satisfied that (1) possible margins of dumping were minimal in relation to export volume, price revisions were made which eliminated any likelihood of LTFV sales, and assurances had been given that no future LTFV sales would occur; (2) sales to the United States were terminated and assurances had been given that they would not resume; or (3) there were other circumstances on the basis of which it was no longer appropriate to continue the investigation. *Id.* The Tariff Act of 1930, § 734, 19 U.S.C.A. § 1673c (Supp. 1979), provides a statutory basis for the suspension of an investigation. In so doing, it eliminates the restriction in (1) that dumping margins be minimal and the unfettered discretion in (3) and replaces them with specific criteria and requirements. The bill improves the procedural safeguards under present law by providing increased participation by the petitioner and allowing an exporter to demonstrate that he is not dumping. *Id.*

200. HOUSE REPORT, *supra* note 103, at 64.

201. "Extraordinary circumstances" is defined in the Tariff Act of 1930, § 734(c)(2)(A), 19 U.S.C.A. § 1673c(c)(2)(A) (Supp. 1979), as circumstances (a) in which the suspension of the investigation will be more beneficial to the domestic industry than continuation of the investigation, and (b) in which the case is complex. With regard to the first factor, the language of the statute is general so as to provide the Secretary with flexibility in administering the provision. However, the provision is not intended to be so general as to be meaningless. HOUSE REPORT, *supra* note 103, at 64. For example, the expenses saved because of prompt settlement of a case or the certainty of prompt relief may make settlement more beneficial than continuation of the investigation. However, every suspension of an investigation results in prompt, certain relief and reduced expenses. *Id.* The Ways and Means Committee though, does not intend that every agreement be deemed more beneficial to domestic industry. *Id.* Rather, the benefits to the petitioner of early settlement must be weighed against the possible relief resulting from a complete investigation. *Id.* For purposes of the provision, a case may be deemed "complex" because there

ports.²⁰² There are two essential requirements for this Agreement: 1) the price level of domestic products must not be undercut or suppressed by such imports,²⁰³ and 2) the amount by which the estimated foreign market value (FMV) surpasses the United States price must not exceed 15 percent of the weighted average dumping margin for all sales of the exporter examined during the investigation.²⁰⁴

It should be noted that the authority to suspend investigations under this section of the Act is discretionary and subject to the overriding requirement that suspension is in the public interest.²⁰⁵ Moreover, effective monitoring of the Agreement must be practicable for the Agreement to remain valid.²⁰⁶

3. Procedures For Suspending an Investigation

The Act requires the Secretary to consult with the petitioner and to notify all parties at least 30 days prior to a suspension. At that time, the petitioner is to receive a proposed copy of the agreement and an explanation of the method of enforcement.²⁰⁷ All parties are to be given an opportunity to submit comments and information for the record prior to the suspension of the investigation.²⁰⁸ The Secretary may not suspend an investigation until on or after the date on which it issues an affirmative preliminary determination. The purpose of this provision is to ensure that the Secretary has developed sufficient information regarding potential dumping margins to form a reasonable basis for an agreement. The agreement must revise prices in order to eliminate either the full margin of dumping or at least 85 percent of that margin and any injurious effect of dumped imports.

The investigation must be suspended upon the date of publication of the notice of suspension in the Federal Register. If the suspension of the investigation is based on an agreement to eliminate the injurious effect of the dumped merchandise, then suspension of liquidation will begin or continue, despite the suspension of the investigation. Liquidation of entries will remain suspended until the termination of the period within which interested domestic parties

are a large number of transactions to be investigated or claims for adjustments to be considered, the issues raised are novel, or a large number of firms are involved. *Id.*

202. Tariff Act of 1930, § 734(c), 19 U.S.C.A. § 1673(c) (Supp. 1979).

203. *Id.* § 734(c)(1)(A), 19 U.S.C.A. § 1673(c)(1)(A) (Supp. 1979). The existence of such price undercutting would constitute a violation of the agreement. HOUSE REPORT, *supra* note 103, at 64.

204. Tariff Act of 1930, § 734(c)(1)(B), 19 U.S.C.A. § 1673(c)(1)(B) (Supp. 1979). This provision establishes a minimum price revision, that is, a revision if a lesser amount *per se* fails to eliminate the injurious effect. The provision should not be interpreted, however, as meaning that a price revision in the minimum allowable amount *per se* eliminates the injurious effect. HOUSE REPORT, *supra* note 103, at 64.

205. Tariff Act of 1930, § 734(d)(1)(A), 19 U.S.C.A. § 1673(d)(1)(A) (Supp. 1979).

206. *Id.* § 734(d)(1)(B), 19 U.S.C.A. § 1673(d)(1)(B) (Supp. 1979).

207. *Id.* § 734(e)(2), 19 U.S.C.A. § 1673(e)(2) (Supp. 1979).

208. *Id.* § 734(e)(3), 19 U.S.C.A. § 1673(e)(3) (Supp. 1979).

can seek review of the agreement by the ITC. If review is sought, suspension of liquidation will continue until the ITC determines that the agreement will eliminate the injurious effect of the imports subject to the investigation.²⁰⁹

4. Review of Suspension

A United States manufacturer of a like product, a labor union which is representative of an industry engaged in the domestic manufacturing of a like product, or a trade or business association a majority of whose members manufacture a like product may, within 20 days after the date of suspension of an investigation based on an agreement to eliminate the injurious effect of the dumped imports, file a petition with the ITC requesting a review of the suspension.²¹⁰ The ITC is required to determine within 75 days whether the agreement will eliminate completely the injurious effect of the dumped imports. If the determination is affirmative, the agreement remains in effect and suspension of the investigation continues; if it is negative, the agreement is set aside and the investigation is resumed as if the preliminary affirmative determination were made on the date of the ITC's negative determination.²¹¹

5. Violation of an Agreement

If the Secretary determines that an agreement which is the basis for the suspension of an investigation has been violated, or no longer meets the requirements of the Act, he must suspend liquidation with respect to unliquidated entries of merchandise entered on or after the date on which the violation first occurred.²¹² If the investigation had not been completed, the investigation is resumed and,²¹³ if the investigation had been complete, an antidumping order is issued.²¹⁴

209. The purpose of this provision is to ensure that the domestic industry is fully protected in the event that an agreement is found not to eliminate completely the injurious effect of the dumped imports. HOUSE REPORTS, *supra* note 103, at 66. However, if upon review, the ITC finds that the injurious effect has not been completely eliminated, the suspension of liquidation could remain in effect for a longer period than that permitted under the international Antidumping Agreement. *Id.* To preclude challenges to the U.S. procedures in the GATT, the House Ways & Means Committee required a waiver of the relevant provisions of the Antidumping Agreement as a precondition to any suspension of investigation which purports to eliminate the injurious effect of the dumped imports. *Id.* See also Antidumping Agreement, *supra* note 68, art. 5.

210. Tariff Act of 1930, § 734(h)(1), 19 U.S.C.A. § 1673c(h)(1) (Supp. 1979).

211. *Id.* § 734(h)(2), 19 U.S.C.A. § 1673c(h)(2) (Supp. 1979).

212. *Id.* § 734(i)(1)(A), 19 U.S.C.A. § 1673c(i)(1)(A) (Supp. 1979).

213. *Id.* § 734(i)(1)(B), 19 U.S.C.A. § 1673c(i)(1)(B) (Supp. 1979).

214. *Id.* § 734(i)(1)(C), 19 U.S.C.A. § 1673c(i)(1)(C) (Supp. 1979). Intentional violations of an agreement are treated in the same manner as a fraudulent violation of § 592 of the Act of 1930, 19 U.S.C. § 1592 (1976) - *i.e.*, forfeiture of the goods involved. However, this provision is not intended to require that the violation involve a false statement or declaration as required under § 592. HOUSE REPORT, *supra* note 103, at 66.

6. Continuation of Investigation

To conform United States law to the provisions of the multilateral anti-dumping agreement²¹⁵ section 734(g) provides that, if exporters representing a significant proportion of the trade in the merchandise under investigation make a timely request, the investigation will continue despite the publication of a notice to suspend the investigation. When an investigation is so continued, if the final determination by either the Secretary, relating to sales at less than fair value, or the ITC, relating to injury, is negative, then the agreement on which the suspension of investigation is based will cease to have effect and the investigation must be terminated. If the final determinations by the Secretary and the ITC are affirmative, the agreement will remain in force and an antidumping duty order will not be issued so long as the agreement remains in effect. The bill also provides that suspended investigations will be continued upon a timely request by a domestic interested party to the investigation.²¹⁶

E. Final Determinations

1. Final Determination of Sales at LTFV

The Act amends prior law by reducing from 90 to 75 days the time in which the Secretary must generally make a final determination of sales at LTFV.²¹⁷ The period for this determination may be extended, at the discretion of the Secretary for up to 135 days upon the request of exporters representing a significant proportion of the imported merchandise (if the preliminary determination of the Secretary was affirmative)²¹⁸ or the petitioner (if the preliminary determination of the Secretary was negative).²¹⁹ This provision appears to balance the need for expedited proceedings with the concern that the proceedings must not become so abbreviated as to result in arbitrary decisions²²⁰ and provides enough flexibility to extend the period for a final determination where necessary.

If the Secretary reaches a final negative determination, all proceedings stop, including any injury investigation being conducted by the ITC. This was the same under prior law.²²¹ However, under the Act of 1979, the effect of a final affirmative determination depends upon the nature of the Secretary's

215. Antidumping Agreement, *supra* note 68, art. 5.

216. For a definition of "interested party", see note 146 *supra*.

217. Compare Antidumping Act, 1921, § 201(a), 19 U.S.C. § 160(a) (1976), with Tariff Act of 1930, § 735(a)(1), 19 U.S.C.A. § 1673d(a)(1) (Supp. 1979).

218. Tariff Act of 1930, § 735(a)(2)(A), 19 U.S.C.A. § 1673d(a)(2)(A) (Supp. 1979).

219. *Id.* § 735(a)(2)(B), 19 U.S.C.A. § 1673d(a)(2)(B) (Supp. 1979).

220. HOUSE REPORT, *supra* note 103, at 67.

221. Antidumping Act, 1921, § 201(b), 19 U.S.C. § 160(b)(1)(C) (1976).

preliminary determination. If the preliminary determination was negative and the final determination is affirmative, the Secretary must order the suspension of liquidation in accordance with section 733(d) and make available to the ITC information upon which the final determination was based.²²² The ITC then begins its injury investigation. If the preliminary determination was affirmative and the final determination is negative, the Secretary must then terminate any retroactive suspension of liquidation and also must release any bond or security and refund any cash deposit with respect to entries of merchandise as to which liquidation was retroactively suspended.²²³

2. Final Determination of Injury

The Act requires the ITC to make a final determination as to whether a domestic industry is being materially injured, threatened with material injury, or whether the establishment of a domestic industry is being materially retarded.²²⁴ The Act changes prior law with respect to a final injury determination by the ITC both in terms of the point at which the determination begins and the total period of investigation preceeding the final determination. Under the Antidumping Act, 1921, the ITC began its injury determination only after the Secretary made a final determination of sales at LTFV.²²⁵

The new provisions of the Act of 1930 expedite the proceedings by requiring the ITC to begin its injury investigation upon notice of an affirmative preliminary determination by the Secretary.²²⁶ The ITC has 120 days within which to complete its investigation. This time frame provides the ITC with at least 45 days after the final affirmative determination by the Secretary to complete its investigation. This allows it to take into account any difference between the Secretary's preliminary and final determinations. Such differences may appear in dumping margins. If the preliminary determination of the Secretary is negative, then the ITC must make its final injury determination no later than 75 days after the date of the Secretary's final affirmative determination.²²⁷ If the ITC determination is negative, the investigation terminates.²²⁸ If an affirmative determination is made, the Secretary must publish an antidumping order within 7 days of receiving notice of the ITC determination.²²⁹

If the ITC finds threat of material injury (rather than actual material injury) it must also determine whether material injury would have been found

222. Tariff Act of 1930, § 735(c)(1), 19 U.S.C.A. § 1673d(c)(1) (Supp. 1979).

223. *Id.* § 735(c)(3), 19 U.S.C.A. § 1673d(c)(3) (Supp. 1979).

224. *Id.* § 735(b)(1), 19 U.S.C.A. § 1673d(b)(1) (Supp. 1979).

225. Antidumping Act, 1921, § 201(a), 19 U.S.C. § 160(a) (1976).

226. Tariff Act of 1930, § 735(b)(2), 19 U.S.C.A. § 1673d(b)(2) (Supp. 1979).

227. *Id.* § 735(b)(3), 19 U.S.C.A. § 1673d(b)(3) (Supp. 1979).

228. *Id.* § 735(c)(2), 19 U.S.C.A. § 1673d(c)(2) (Supp. 1979).

229. *Id.*

but for the suspension of liquidation ordered by the Secretary following its initial affirmative finding. If material injury would have been found, the antidumping order shall apply with respect to entries subject to the notice of suspension of liquidation.²³⁰

Both the ITC and the Secretary must provide interested parties with an opportunity to present their views orally before they make their final determinations.²³¹ This is not a formal hearing within the meaning of § 556 of the Administrative Procedures Act,²³² and does not necessarily involve the examination or cross-examination of witnesses under oath. It is the intent of Congress that interested parties be permitted to make timely submissions of written views at any point in the proceeding. This includes the opportunity to rebut statements presented orally.²³³

If critical circumstances have been alleged during the investigation, the final determinations of both the Secretary and the ITC must contain findings as to whether the elements of critical circumstances have in fact been shown.²³⁴ If the findings are affirmative, the antidumping order will apply to entries subject to the retroactive suspension of liquidation.²³⁵

Notice of all determinations made by the Secretary and the ITC must be published in the Federal Register. Such notice need not contain the findings of fact or conclusions of law on which the determination is based. However, this information must be publicly available, and the notice must indicate where it can be obtained.²³⁶

F. *Assessment of Antidumping Duties*

In response to a 3½ year average delay between entry of merchandise subject to a dumping finding and assessment of actual dumping duties,²³⁷ the new provisions of the Act of 1930 provide for expeditious administration of an antidumping order. This is accomplished in two ways. First, maximum time limits on assessment are established.²³⁸ Thus assessment of dumping duties must occur within 6 months after the date on which the Secretary receives

230. *Id.* § 735(b)(4)(B), 19 U.S.C.A. § 1673d(b)(4)(B) (Supp. 1979).

231. *Id.* § 735(d), 19 U.S.C.A. § 1673d(d) (Supp. 1979).

232. 5 U.S.C. § 556 (1976). This section regulates hearings before federal agencies.

233. HOUSE REPORT, *supra* note 103, at 68.

234. Tariff Act of 1930, § 735(a)(3), 19 U.S.C.A. § 1673d(a)(3) (Supp. 1979). Critical circumstances exist where there is a previous history of dumping in the United States or elsewhere of the merchandise under question and the importer knew or should have known that the exporter was selling the merchandise at LTFV, and where there has been massive imports of the merchandise under investigation. *Id.*

235. *Id.* § 735(b)(4)(A), 19 U.S.C.A. § 1673d(b)(4)(A) (Supp. 1979).

236. *Id.* § 735(d), 19 U.S.C.A. § 1673d(d) (Supp. 1979).

237. HOUSE REPORT, *supra* note 103, at 69.

238. There were no maximum time limits on assessment of dumping duties under the Antidumping Act, 1921.

satisfactory information upon which to base an assessment. In no event may it occur later than 1 year after the end of the annual accounting period of the manufacturer or exporter during which the merchandise is entered.²³⁹ Second, the Act requires that merchandise subject to an antidumping order be entered only upon the deposit of estimated antidumping duties.²⁴⁰ Under prior law, such merchandise was permitted to enter under bond.²⁴¹

There is a limited exception to the requirement of a deposit of estimated duties for importers who have taken certain actions either to eliminate or substantially reduce dumping margins between the date of an affirmative preliminary determination by the Secretary and the final affirmative determination by the ITC.²⁴² Thus, for a three month period following the issuance of an antidumping order, the Secretary may continue to permit entry of merchandise subject to the order under bond for individual importers if there is reason to believe that those importers have taken steps to revise their prices to result in a significantly lower dumping margin. During this three-month period, the Secretary will examine the merchandise that entered during the period between its own preliminary determination and the ITC's final determination. If assessment on such entries can be made within the three month period in accordance with the procedures of section 737(b) of the Act of 1930, then assessment will take place and the new dumping margins derived from this assessment will serve as the basis for the deposit of estimated duties on future entries.²⁴³

Antidumping duties are assessed on entries of merchandise subject to an antidumping order made on or after the date on which notice of an affirmative ITC final determination is published.²⁴⁴

The new provisions of the Act of 1930 amend prior law to bring it into con-

239. Tariff Act of 1930, § 736(a)(1)(A), 19 U.S.C.A. § 1673e(a)(1)(A) (Supp. 1979). In the case of a related party transaction, that is, where the U.S. price is not determined until the goods are sold after their entry into the United States, the maximum period for assessment will be 12 months after the end of the accounting period within which the merchandise is sold to an unrelated purchaser in the United States. *Id.*

240. *Id.* § 736(a)(3), 19 U.S.C.A. § 1673e(a)(3) (Supp. 1979).

241. Antidumping Act, 1921, § 201(b), 19 U.S.C. § 160(b) (1976). In its report, the House Ways and Means Committee stated its dissatisfaction with the prior law in that it did not deter dumping. HOUSE REPORT, *supra* note 103, at 69. Rather, the Committee stated, it provided an incentive to exporters and importers to delay submitting information necessary to form the basis of an assessment. *Id.* The case deposit provision is an attempt to ensure that complete information will be submitted to the Secretary in a timely manner. The Committee went on to state its concern with the effect that the requirement of a cash deposit of estimated duties will have on small importers who have taken steps to eliminate dumping. *Id.* at 70.

242. Tariff Act of 1930, § 737(b), 19 U.S.C.A. § 1673f(b) (Supp. 1979).

243. *Id.* § 736(3), 19 U.S.C.A. § 1673e(3) (Supp. 1979).

244. *Id.* § 736(b)(1), 19 U.S.C.A. § 1673e(b)(1) (Supp. 1979). Antidumping duties are also assessed upon issuance of an antidumping order covering entries of merchandise, the liquidation of which had been suspended during an investigation pursuant to § 733(d), 19 U.S.C.A. § 1673b(d) (Supp. 1979), unless (1) in the case of a retroactive suspension of liquidation based on allegations of critical circumstances it is finally determined that critical circumstances do not exist

formity with the Antidumping Agreements by requiring that the difference between a cash deposit collected as security on an entry of merchandise subject to a notice of suspension of liquidation under section 733(d) and the amount of the duty finally assessed must be disregarded if the deposit is less, and refunded if the deposit is greater, than the amount finally assessed.²⁴⁵

G. Administrative Review

The new Title VII of the Act of 1930, as contained in the Act of 1979, requires the Secretary to review the amount of any antidumping duty and the current status of, and compliance with, any agreement which suspended an investigation, at least once during each 12 month period beginning on the anniversary of the date of the publication of the antidumping order.²⁴⁶ A summary of the results of this review along with the notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed, is to be published in the Federal Register.²⁴⁷

The Act also requires both the Secretary and the ITC to review an agreement which served as the basis for the suspension of an antidumping duty investigation.²⁴⁸ An affirmative determination that such an agreement will completely eliminate the injurious effect of dumped imports, that LTFV sales ex-

(in which case entries subject to the retroactive suspension would not be subject to antidumping duties); or (2) the ITC does not find threat of material injury that, but for the suspension of liquidation, would have been material injury by reason of less than fair value imports. *Id.*

245. Compare Tariff Act of 1930, § 737, 19 U.S.C.A. § 1673f (Supp. 1979), with Antidumping Agreement, *supra* note 68, art. 2(c). In order to ensure that neither the United States Government nor the importer suffers a loss from an underestimate or overestimate of antidumping duties, the Act requires a payment of interest in an amount equal to the rate in effect under section 6621 of the Internal Revenue Code or 8 percent, whichever is higher, on overpayments of cash deposits on estimated duties. Tariff Act of 1930, § 778, 19 U.S.C.A. § 1677g (Supp. 1979).

246. *Id.* § 751(a)(1)(B)(C), 19 U.S.C.A. § 1675(a)(1)(B)(C) (Supp. 1979). Under prior law, the Secretary of the Treasury determined the amount of an antidumping duty on an entry-by-entry basis. Adjustments to foreign market value for differences in circumstances of sales and adjustments to other price calculations were made from time to time, as necessary. Antidumping Act, 1921, § 202(a), 19 U.S.C. § 161 (1976). The need for an antidumping duty was reviewed by the Secretary on his own motion or at the request of an interested party if there were changed circumstances. *Id.*

The ITC reviewed an injury finding in an antidumping case on its own motion, at the request of an interested party, or upon advice from Treasury that there were changed circumstances. 19 C.F.R. § 207.5 (1979). Absent "good cause", the ITC would not review an injury determination within two years of a final determination that injury existed. *Id.*

247. Tariff Act of 1930, § 751(a)(1), 19 U.S.C.A. § 1675(a)(1) (Supp. 1979). The results of the review should include a determination of the foreign market value and the United States price of each entry of merchandise included within the review, and the amount, if any, by which the fair market value (FMV) of each entry exceeds the United States price of entry. *Id.* This determination will serve as the basis for the assessment of antidumping duties covering merchandise included in the review but not considered under the original investigation, as well as for deposits of estimated duty on similar entries not covered by the review. *Id.* § 751(a)(2), 19 U.S.C.A. § 1675(a)(2) (Supp. 1979).

248. *Id.* § 751(b)(1), 19 U.S.C.A. § 1675(b)(1) (Supp. 1979).

ist, or that a domestic industry is being injured by reason of imports sold at LTFV is subject to review.²⁴⁹ The Secretary and the ITC may initiate a review under this section only if they are satisfied that 'changed circumstances' sufficient to warrant review exist.²⁵⁰ The ITC may not review a final affirmative injury determination absent a showing of good cause.²⁵¹ The Secretary may not review a determination to suspend an investigation or a final affirmative determination of sales at LTFV less than 24 months after the date of publication of their notice.²⁵² If the Secretary determines that sales at LTFV no longer exist, he may revoke an antidumping order in whole or in part.²⁵³

H. *Judicial Review*²⁵⁴

Title X of the Act of 1979 provides for appeal of certain interlocutory and all final rulings by the Secretary or the ITC in antidumping cases.²⁵⁵ Structurally, Title X amends the Tariff Act of 1930, by adding a new section 516A, which sets out specific judicial review procedures for antidumping and countervailing duty proceedings.²⁵⁶ The provision provides a statutory listing of those specific determinations which are reviewable. This results in increased due process safeguards and expedites judicial relief.

249. *Id.*

250. *Id.*

251. *Id.* § 751(b)(2)(A), 19 U.S.C.A. § 1675(b)(2)(A) (Supp. 1979).

252. *Id.* § 751(b)(2)(B), 19 U.S.C.A. § 1675(b)(2)(B) (Supp. 1979).

253. *Id.* § 751(c), 19 U.S.C.A. (c) (Supp. 1979).

254. The United States Customs court has exclusive jurisdiction for review of antidumping orders. *Id.* § 516(a), 19 U.S.C.A. § 1516a(a) (Supp. 1979). The principal offices of the Customs Court are located in New York City, but the court is empowered to hear and determine cases arising in other locations of the United States. The court still "rides circuit" and thus there should be no great burden on petitioners who are located great distances from New York. HOUSE REPORT, *supra* note 103, at 179.

255. Tariff Act of 1930, § 516A, 19 U.S.C.A. § 1516a (Supp. 1979). The Act provided judicial review of determinations by the Customs Service of the appraised value, classification, or rate of duty of imported goods. *Id.* Further, the Act provides for judicial review of Customs Service decisions regarding the certification "country of origin" markings. *Id.* Under prior law judicial review was provided for determinations of foreign market value, determinations of purchase or exporter's price, and the actual assessment of dumping duties. Antidumping Act, 1921, § 210, 19 U.S.C. § 169 (1976). Appeals were heard in the United States Customs Court, the Court of Customs and Patent Appeals, and via a writ of certiorari, the United States Supreme Court. *Id.* The act did not provide for review of Commission determinations of injury, but it did provide for review of the requirement that the injury found be to an industry in the United States. *Id.* Challenges to injury findings could be accomplished solely through a challenge to the initial findings of sales at LTFV. *Id.* See also 19 C.F.R. § 153.65(b) (1979). For a complete analysis of judicial review under the Antidumping Act, 1921, see Metzger & Mursey, *Judicial Review of Tariff Commission Actions and Proceedings*, 56 CORNELL L. REV. 285 (1971).

256. Prior § 516 of the Tariff Act of 1930, 19 U.S.C. § 1516 (1976), has been amended to delete those procedures dealing with antidumping and countervailing duty determinations and will now address procedures for a domestic party's contest of appraised value, classification, or the rate of duty of imported merchandise. *Id.* § 516A, 19 U.S.C.A. § 1516a (Supp. 1979).

1. Standing to Appeal

The Act enlarges the class of those parties who have standing to challenge a ruling. Any interested party who is also a party to the proceedings now has the right to appear and be heard as a party in interest before the United States Customs Court.²⁵⁷ Therefore, in addition to manufacturers, producers, or wholesalers in the United States of a like product, standing is accorded to a certified union, a recognized union or group of workers which is representative of an industry engaged in the production in the United States of a like product, as well as to a trade or business association, a majority of whose members manufacture, produce, or wholesale a like product in the United States.²⁵⁸ This should serve to encourage parties to participate in the proceedings since such participation is a prerequisite to appeals of any determinations.

2. Scope of Review

The new provisions provide for judicial review of all final, and several interlocutory, determinations made by the Secretary and the ITC during antidumping or countervailing duty proceedings.²⁵⁹ Prior law provided only for review of negative determinations by the Secretary of the Treasury.²⁶⁰

3. Standard of Review

The new judicial review provisions provide two standards of review for two types of determinations.²⁶¹ Interlocutory determinations as to whether or not to initiate an investigation, that a case is extraordinarily complicated, not to review an agreement based on changed circumstances, and determinations as to whether there is reasonable indication of material injury are judged by an arbitrary and capricious standard.²⁶² Administrative level determinations such as whether sales at LTFV exist or whether a domestic industry is being materially injured are judged by a substantial evidence standard.²⁶³

De novo review of determinations or assessments made pursuant to the antidumping laws is eliminated by the Act. The rationale for *de novo* review was the need to safeguard the rights of all parties to an antidumping proceeding, which were informal, non-adversarial and not subject to Administrative Pro-

257. *Id.* § 516A(d), 19 U.S.C.A. § 1516a(d) (Supp. 1979).

258. *Id.* §§ 771(a)(C), (D) & (E), 19 U.S.C.A. §§ 1677(a)(C), (D) & (E) (Supp. 1979).

259. *Id.* § 516A(d), 19 U.S.C.A. § 1516a(d) (Supp. 1979).

260. *Id.* §§ 516A(a)(A) & (B), 19 U.S.C.A. §§ 1516a(A) & (B), (Supp. 1979), explicitly provides for judicial review of the amount of an antidumping duty assessment and a decision by the Secretary of the Treasury not to assess a duty at all. *Id.*

261. *Id.* § 516A(b)(1), 19 U.S.C.A. § 1516a(b)(1) (Supp. 1979).

262. *Id.* § 516A(b)(1)(A), 19 U.S.C.A. § 1516a(b)(1)(A) (Supp. 1979).

263. *Id.* § 516A(b)(1)(B), 19 U.S.C.A. § 1516a(b)(1)(B) (Supp. 1979).

cedure Act requirements.²⁶⁴ The amendments made by Title I of the Act of 1979 providing for substantially increased access by all parties to information upon which the decision of the Secretary or the ITC is based²⁶⁵ together with a requirement of a record of the proceedings²⁶⁶ has removed the need for review of this type.²⁶⁷

4. Review Procedures

Any party with standing can challenge a determination in the Customs Court within 30 days of notice of the determination.²⁶⁸ These cases are given priority on the court's docket, with cases involving a challenge to an interlocutory order given preference.²⁶⁹

5. Remedies

The Act permits the Customs Court to enjoin liquidation of some or all entries of merchandise covered by a determination of the Secretary or the ITC. Prior law required merchandise to be liquidated in accordance with the administrative decision if entered prior to the first ruling of a court adverse to the administrative decision.²⁷⁰ Although there is a presumption of administrative correctness under the Act of 1979,²⁷¹ the court is permitted to enjoin liquidation in appropriate circumstances.²⁷²

264. See text accompanying note 232 *supra*.

265. Tariff Act of 1930, § 777, 19 U.S.C.A. § 1677f (Supp. 1979), provides for increased access to all information generated during antidumping proceedings. The section calls for: 1) the establishment of a library containing information on foreign subsidy practices; *id.*; 2) the ITC and the Secretary to inform interested parties of the process of any investigation, *id.*; and 3) a record to be kept of all *ex parte* proceedings. *Id.*

266. *Id.* § 516A(b)(2)(A)(i), 19 U.S.C.A. § 1516a(b)(2)(A)(i) (Supp. 1979).

267. HOUSE REPORT, *supra* note 103, at 181.

268. Tariff Act of 1930, § 516A(e), 19 U.S.C.A. § 1516a(e) (Supp. 1979).

269. *Id.* § 516A(f), 19 U.S.C.A. § 1516a(f) (Supp. 1979). This provision represents a significant departure from prior law both in terms of shortening the overall review process and eliminating the disparity in review procedures provided to importers and domestic interested parties. HOUSE REPORT, *supra* note 103, at 79. Under prior law, most challenges began in the form of a protest and review at the administrative level. Antidumping Act, 1921, § 210, 19 U.S.C. § 169 (1976). In the case of importer protests, the Customs Service could take as long as two years to grant or deny the protest. The Secretary was under no time limit to make decisions with respect to protests by domestic manufacturers. *Id.* Under § 751(a) of the Tariff Act of 1930, 19 U.S.C.A. § 1675(a) (Supp. 1979), a 30 day period is provided to all parties to commence an action. *Id.* This replaces the prior period of 180 days for importers and 30 days for domestic manufacturers. Antidumping Act, 1921, § 210, 19 U.S.C. § 169 (1976).

270. *Id.*

271. Tariff Act of 1930, § 516A(a)(2)(B), 19 U.S.C.A. § 1516a(a)(2)(B) (Supp. 1979).

272. This provision is intended to remedy a disparity in prior law between the relief available to importers and that available to domestic manufacturers. HOUSE REPORT, *supra* note 103, at 182. Under the Tariff Act of 1930, § 514, 19 U.S.C.A. § 1514 (Supp. 1979) an importer could appeal every entry subject to an antidumping order. If he was successful, all duties would be refunded, affording the importer complete relief. *Id.* The domestic manufacturer could only appeal certain entries as test cases, *Id.*

VI. CONCLUSION

The purpose of this Recent Development has been to examine nontariff barriers in general and to provide a guide to current antidumping procedures in the United States. After providing a general discussion of nontariff barriers and their economic effects on world trade, the recently concluded Tokyo Round of Multilateral Trade Negotiations was examined. Finally, the new United States antidumping procedures under the Trade Agreements Act of 1979 was compared with the old procedures under the Antidumping Act, 1921.

The antidumping provisions contained in the Act of 1979 punctuate the legal axiom that the procedures for the enforcement of a statute are often more important than the substantive content of the statute. While the substantive material injury test should, to some extent, achieve its objective of reducing the barrier to free trade that an unchecked use of antidumping duties can present, the procedural aspects of the Act, such as the requirement that the Secretary of the Treasury initiate dumping investigations *sua sponte*, the retroactive application of dumping duties and the broad judicial review and remedies available, may reduce the usefulness of the more stringent material injury standard. Whether these procedures strike an effective balance between the international drive towards free trade and the need to protect domestic industries, or whether they merely serve to take with one hand what was given by another, remains to be seen. There can be no doubt, however, that the new antidumping procedures help eliminate the uncertainties arising out of the old procedures and thus reduce the effectiveness of antidumping duties as a nontariff trade barrier.

Jeffrey Burton Sklaroff